

AUG 22 1996

In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**JOINT APPENDIX
Volume I**

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NOTATION RE ITEMS PREVIOUSLY SUBMITTED

The following opinions, decisions, orders and other parts of the record have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the petition for a writ of certiorari and within the appendix to the brief in opposition to the petition for a writ of certiorari.

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II.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
(FRESNO)

CIVIL DOCKET FOR CASE No. 90-CV-473

Assigned to: Judge Oliver W. Wanger
Referred to: Magistrate Judge Dennis L. Beck

Jury Demand: Defendant
Demand: \$6,000,000 Nature of Suit: 891
Lead Docket: 91-CV-625 Jurisdiction: US
Dkt# in Other Defendant
Court: None
Filed: 07/27/90

WILEMAN BROTHERS AND ELLIOTT INC., A CALIFORNIA
CORPORATION, AND KASH INC, A CALIFORNIA
CORPORATION, PLAINTIFF

v.

DEPARTMENT OF AGRICULTURE, CLAYTON YUETTER,
SECRETARY OF AGRICULTURE, DEFENDANT

GERAWAN FARMING INC counter-claimant Thomas Elmer Campagne
[COR LD NTC]
Thomas E. Campagne
Law Firm
Airport Office Center
1685 North Helm Avenue

WILEMAN BROTHERS
AND ELLIOTT INC
counter-claimant

Thomas Elmer Campagne
(See above)
[COR LD NTC ret]

KASH INC
counter-claimant

Thomas Elmer Campagne
(See above)
[COR LD NTC ret]

UNITED STATES OF
AMERICA
counter-defendant

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WILEMAN BROTHERS AND ELLIOTT INC., A CALIFORNIA
CORPORATION; KASH INC., A CALIFORNIA
CORPORATION, PLAINTIFF

v.

DEPARTMENT OF AGRICULTURE, CLAYTON YUETTER,
SECRETARY OF AGRICULTURE, DEFENDANT

GERAWAN FARMING INC; WILEMAN BROTHERS AND
ELLIOTT INC; KASH INC, COUNTER-CLAIMANT

v.

UNITED STATES OF AMERICA, COUNTER-DEFENDANT

RELEVANT DOCKET ENTRIES

7/27/90 1 COMPLAINT summons issd (1); fee
status pd; Receipt # 129370; Notice re:
Consent forms. w/attached Exh "A" (kp)
[1:90cv473]

8/5/91 — ORDER by Judge Wanger consolidating
cases 1:87-cv-392 with member cases 1:88-
cv-568, 1:90-cv-88, 1:90-cv-473, 1:91-cv-318,
1:91-cv-319; plaintiffs shall file their
amended complaint by 10/7/91; cross-
motions due 11/8/91; opposition to
motions due 11/22/91; cross-replies due
12/10/91; any motions in 87-392 & 90-473
shall be heard 9:00 1/17/92; administrative
record due 10/7/91; order with stipulation
to be lodged by 8/15/91 (cc: all counsel)
(kp) [Entry date 08/06/91] [1:87cv392]

8/5/91 — ORDER by Judge Wanger granting
motion by plaintiff to Expedite the the
Administrative Process [52-1]; re Cases
AMA Docket #'s F&V 916-1; 917-3, 916-2,
917-2, 916-3, 917-4, and that the written
record of final decision shall be filed by
10/2/91 with the court (cc: all counsel) (kp)
[Entry date 08/06/91] [1:87cv392]

8/28/91 19 ORDER by Judge Oliver W. Wanger
consolidating cases 1:90-cv-473 with
member cases 1:87-cv-392, 1:88-cv-268,
1:90-cv-88, 1:91-cv-318, 1:91-cv-319, 1:88-cv-
568 (cc: all counsel) (kp) [1:90cv473]

10/7/91 24 1st AMENDED COMPLAINT [1] by plaintiff in 1:90-cv-00473 (kp) [Entry date 10/08/91] [1:90cv473]

1/26/93 113 MEMORANDUM, Opinion and Order: by Judge Oliver W. Wanger granting motion by USA for summary judgment before Judge Wanger [38-1], denying motion by plaintiffs for summary judgment before Judge Wanger [36-1]; Case mgmt ddl for order from defendants counsel reflecting this order 2/5/93 (cc: all counsel) (cb) [Entry date 01/28/93] [1:90cv473]

1/27/93 114 MODIFIED MEMORANDUM OPINION AND ORDER re cross-motions for summary judgment order [113] (cb) [Entry date 01/28/93] [1:90cv473]

2/2/93 115 ORDER by Judge Oliver W. Wanger granting motion by USA for summary judgment before Judge Wanger [38-1], denying motion by plaintiffs for summary judgment before Judge Wanger [36-1]; Case mgmt ddl for filing of documentation establishing amount of assessments owed by plaintiffs (cc: all counsel) (cb) [Entry date 02/04/93] [1:90cv473]

3/12/93 135 AMENDED COMPLAINT for enforcement of mandatory assignments and for injunctive relief by plaintiff USA in 1:90-cv-00088 (cb) [Entry date 03/18/93] [1:87cv

392 1:88cv568 1:90cv473 1:90cv88 1:91cv318 1:91cv319]

4/7/93 139 ANSWER to First Amended complaint [135] and COUNTERCLAIM; jury demand; cntdft Gerawan Farming Inc, Wileman Bros Elliott, Kash Inc, and against USA to case(s) 1:90-cv-00473, (cb) [Entry date 04/12/93] [1:90cv473]

9/14/93 168 JUDGMENT ENTERED: by Judge Oliver W. Wanger dismissing case (1:91-cv-00686 1:91-cv-00625 1:91-cv-00318 1:91-cv-00319 1:88-cv-00568 1:90-cv-00088 1:87-cv-00392) (1:90-cv-00088) (cc: all counsel) (cb) [1:87cv392 1:88cv568 1:90cv473 1:90cv88 1:91cv318 1:91cv319 1:91cv625 1:91cv686]

10/13/93 177 NOTICE OF APPEAL by plaintiff from Dist. Court decision [168-2] (fee status: paid) (lm) [Entry date 10/18/93] [1:90cv473]

GENERAL DOCKET FOR
NINTH CIRCUIT COURT OF APPEALS

No. 93-16977

Nsuit: 2891 Agricultural Acts (USdf)
Case type information:

- (1) civil
- (2) US

Lower Court information:

District: Lead: 0972-1: CV-90-00473-OWW
[14 lower court entries omitted]

WILEMAN BROTHERS &, ELLIOTT, INC., KASH, INC.;
GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.;
TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS;
CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS,
WILMER HUEBERT FARMS; KOBASHI FARMS;
NAKAYOMA FARMS, INC.; AND MIHARA FARMS,
PLAINTIFFS-APPELLANTS

v.

MICHAEL ESPY, SECRETARY OF AGRICULTURE,
DEFENDANT-APPELLEE

Appeal From Eastern District of California
(Fresno)

Filed: 10/28/93
Docket: June 20, 1996

10/28/93 DOCKETED CAUSE AND ENTERED
APPEARANCES OF COUNSEL. CADS
SENT (Y/N): y setting schedule as follows:
CADS due 11/12/93, ; appellant's designation
of RT is due 11/8/93; appellee's designation
of RT is due 11/17/93; appellant shall order
transcript by 11/29/93; court reporter shall
file transcript in DC by 12/28/93, ; certi-
ficate of record shall be filed by 1/4/94 ;
appellant's opening brief is due 2/4/94;
appellees' brief is due 3/15/94; appellants'
reply brief is due 3/29/94; [93-16977] (rei)

2/13/95 ARGUED AND SUBMITTED TO Thomas
TANG, Diarmuid F. O'SCANNLAIN,
Robert R. Merhige [93-16977] (mlm)

6/27/95 FILED OPINION: AFFIRMED IN PART,
REVERSED IN PART, AND REMAND-
ED. Each party shall bear its own costs.
(Terminated on the Merits after Oral Hear-
ing; Affirmed (in part) and Reversed (in
part); Written, Signed, Published. Thomas
TANG; Diarmuid F. O'SCANNLAIN,
author; Robert R. Merhige.) FILED AND
ENTERED JUDGMENT. [93-16977] (ot)

9/18/95 Filed order and amended opinion (Judge
Thomas TANG, Diarmuid F. O'SCAN-
NLAIN, Robert R. Merhige) (Orig. opinion
id: The opn filed on June 27, 1995 at slip op.
7401 is amended as follows: (see case file)....
The petitions for rehearing are denied and
the suggestion en banc is rejected.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each part to bear its own costs. [93-16977] (ot)

- 10/3/95 Filed order FOR PUBLICATION (Thomas TANG, Diarmuid F. O'SCANNLAIN): The Order and Amended Order filed on Sep 18, 1995 at slip op. 11753 is [sic] further amended as follows: Slip op. 11759: Delete the last two full paragraphs of the order. [93-16977] (ot)
- 10/17/95 Filed order (Thomas TANG, Diarmuid F. O'SCANNLAIN, Robert R. Merhige): denying petition for rhrq and the suggestion for enbanc rehearing is rejected. [93-16977] (ot)
- 10/25/95 MANDATE ISSUED [93-16977] (crw)
- 6/6/96 Filed Supreme Court order, certiorari denied on 6/3/96. Supreme Court No. 95-1393 [93-16977] (crw)
- 6/7/96 Received notice from Supreme Court, Supreme Court No. 95-1184: petition for certiorari GRANTED on 6/3/96. Motions granted to file amicus curiae brief by American Mushroom Institute, Nat'l Assoc. of State Depts. of Agri. (mlm)

APPENDIX TO WILEMAN/KASH II DECISION

INDEX TO PETITIONERS' AND RESPONDENT'S TRIAL EXHIBITS

- EXHIBIT 1: Index to Petitioners' and Respondent's Trial Exhibits
- EXHIBIT 2: *Rough Draft of Post-Hearing Preliminary and Tentative Findings of Fact*, Administrative Law Judge Dorothea A. Baker, March 16, 1988, Issued in the Related Case; of Wileman Bros. & Elliott, Inc. and Kash, Inc. (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3)
- EXHIBIT 3: *Decision and Order*, Administrative Law Judge Dorothea A. Baker, Issued in the Related Case of Wileman Bros. & Elliott, Inc. and Kash, Inc. (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3)
- EXHIBIT 4: Petitioners' Amended 7 U.S.C. §608c(15) (A) Administrative Petition
- EXHIBIT 4(A): Petitioners' Application For Interim Relief (Application Pursuant To §900.70, Title 7 C.F.R.; AMA Docket Nos. 916-3 and 917-4)

- EXHIBIT 4(B): Judicial Officer Campbell's Order Denying Interim Relief (AMA Docket Nos. F&V 916-3 and 917-4)
- EXHIBIT 5: Respondent's Answer to Petitioners' Amended 7 U.S.C. §608c (15)(A) Administrative Petition
- EXHIBIT 6: Petitioners' Administrative Hearing Brief
- EXHIBIT 7: Petitioners' Appendix to Administrative Hearing Brief (A.B. refers to "Appendix to Brief"):
- A.B.1. Petitioners' Index To Appendix to Administrative Hearing Brief
 - A.B.2. Federal Register Dated April 8, 1988, Setting Forth the Proposed Rule Regarding Changes to the Size and Maturity Regulations for California Plums.
 - A.B.3. Federal Register Dated April 25, 1988, Extending Time Period for Filing Written Comments on the Proposed Size and Maturity Regulations for California Plums.
 - A.B.4. Federal Register Dated April 18, 1988, Setting Forth the Proposed Rule

- Regarding Changes to the Size and Maturity Regulations for California Nectarines
- A.B.5. Federal Register Dated April 18, 1988, Setting Forth the Proposed Rule Regarding Changes to the Size and Maturity Regulations for California Peaches.
 - A.B.6. Federal Register Dated May 27, 1988, Setting Forth Interim-Final Rule Regarding Maturity Requirements and Variance Procedures for California Plums.
 - A.B.7. Federal Register Dated May 27, 1988, Setting Forth Interim-Final Rule Regarding Size Regulations for California Nectarines.
 - A.B.8. Federal Register Dated May 27, 1988, Setting Forth Interim-Final Rule For Size Regulations for California Peaches.
 - A.B.9. Federal Register Dated June 21, 1988, Proposed Assessment Rates for California Nectarines,

Plums and Peaches for 1988 Harvest Season.

- A.B.10 Federal Register Dated July 19, 1988, Final Assessment Rates for California Nectarines, Plums and Peaches for the 1988 Harvest Season.
- A.B.11 First Amended Complaint For Enforcement of Mandatory Assessment And For Injunctive Relief, U.S.A. v. Wileman Brothers, et al.
- A.B.12 Defendants' Answer To First Amended Complaint, Defendants' Counterclaim Against The United States, And Defendants' Request For Jury Trial, U.S.A. v. Wileman Brothers, et al.
- A.B.13 Memorandum Of Points And Authorities In Support of Cross-Motion For A Stay Of The Complaint, U.S.A. v. Wileman Brothers, et al.
- A.B.14 Supplemental Argument In Support Of Defendants Cross-Motion For Stay Of Complaint, etc., U.S.A.

v. Wileman Brothers, et al.

- A.B.15 Reporter's Transcript of Proceedings Regarding Plaintiffs Motion For Summary Judgment And Motion To Dismiss and Defendant's Cross-Motion For Summary Judgment And For Stay of Proceedings. U.S.A. v. Wileman Brothers, et al.
- A.B.16 Memorandum Decisions Re: (1) Plaintiff's Motion for Summary Judgment; (2) Plaintiff's Motion To Dismiss Counterclaims; (3) Defendant's Motion For Partial Adjudication and/or Judgment on the Pleadings; and (4) Defendants' Motion For Stay of the Action, U.S.A. v. Wileman Brothers, et al.
- A.B.17 Tree Fruit Reserve Letter of July 7, 1989, Requesting Support In Overturning Judge Baker's Decision.
- A.B.18 Laws of the 89th Congress, Produce Marketing Orders/Advertising.

- A.B.19 Federal Register Dated May 12, 1971, Setting Forth Recommended Decision Regarding Amendment of the Marketing Agreement And Order for California Pears, Plums and Peaches.
- A.B.20 Federal Register Dated March 3, 1971, Setting Forth Recommended Decision Regarding Amendment of the Marketing Agreement and Order for California Nectarines.
- A.B.21 Federal Register Dated July 16, 1979, Setting Forth Final Rule For Assessment Rates for 1979 Harvest Season for California Nectarines, Plums and Peaches.
- A.B.22 Federal Register Dated August 12, 1980, Setting Forth Final Rule For Assessment Rates for 1980 Harvest Season for California Nectarines, Plums and Peaches.
- A.B.23 Federal Register Dated August 10, 1981, Setting Forth Final Rule For Assessment Rates for

- 1981 Harvest Season For Peaches, Plums and Nectarines.
- A.B.24 Federal Register Dated February 28, 1983, Setting Forth Final Rule For Assessment Rates for 1982 Harvest Season For Nectarines.
- A.B.25 Federal Register Dated August 4, 1983, Setting Forth Final Rule For Assessment Rates For The 1983 Harvest Season For Peaches, Plums and Nectarines.
- A.B.26 Federal Register Dated August 14, 1984, Setting Forth Final Rule For Assessment Rates For 1984 Harvest Season For Peaches, Plums and Nectarines.
- A.B.27 Federal Register Dated January 3, 1985, Setting Forth Assessment Rates For 1984 Harvest Season For California Plums.
- A.B.28 Federal Register Dated July 12, 1985, Setting Forth Final Rule Establishing Assessment Rates For 1985 Harvest

Season For Peaches,
Plums and Nectarines.

A.B.29 Federal Register Dated
March 14, 1986, Setting
Forth Amendments to the
Assessment Rates for
1985 Harvest Season For
California Nectarines.

A.B.30 Federal Register Dated
October 17, 1986, Setting
Forth Final Rule Re-
garding Assessment Ra-
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Season For California
Nectarines, Plums and
Peaches.

A.B.31 Federal Register Dated
February 26, 1987, Set-
ting Forth Amendment to
the Final Rule Regarding
Assessments For 1986
Harvest Season For Cali-
fornia Plums.

A.B.32 Federal Register Dated
August 20, 1987, Setting
Forth Final Rule For
Assesment Rates of 1987
Harvest Season For Cali-
fornia Nectarines, Plums
and Peaches.

A.B.33 Federal Register Dated
March 27, 1989, Setting
Forth Final Rule Re-

garding Maturity Modifi-
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cedures For California
Nectarines.

A.B.34 Federal Register Dated
March 27, 1989, Setting
Forth Maturity Require-
ments and Variance Pro-
cedures For California
Plums.

A.B.35 Federal Register Dated
March 27, 1989, Setting
Forth Final Rule For
Maturity Requirements
and Variance Procedures
For California Peaches.

- EXHIBIT 8: Respondent's Pre-Hearing Brief
- EXHIBIT 9: Administrative Law Judge Do-
rothea A. Baker's Notice of
Hearing, September 7, 1989
- EXHIBIT 10: Respondent's Motion to Dismiss
Portions of the Amended Petition
- EXHIBIT 11: Supplement to Respondent's Mo-
tion to Dismiss Portions of the
Amended Petition
- EXHIBIT 12: Petitioners' Opposition to Re-
spondent's Motion to Dismiss
Portions of the Amended Petition
- EXHIBIT 13: Petitioners' Request for Issuance
of Subpoenas, Subpoena Duces
Tecum, and Production of Docu-
ments [7 CFR §900.62(a)&(b)]

- EXHIBIT 14: Certification by Counsel Re: Petitioners' Requests for Subpoenas, Subpoena Duces Tecum, and Production of Documents
- EXHIBIT 15: Memorandum of Pre-Hearing Telephone Conference Calls, Administrative Law Judge Dorothea A. Baker, October 5, 1989
- EXHIBIT 16: Respondent's Response and Motion to Quash Petitioners' Request for Subpoenas, Subpoena Duces Tecum, and Production of Documents
- EXHIBIT 17: Subpoena Duces Tecum, with Attached Proof of Service to Grant Bennett, Grant Bennett Accountants, a Professional Corporation
- EXHIBIT 18: Subpoena Duces Tecum, with Attached Proof of Service, to Jon Field, Manager CTFA and Secretary-Treasurer, Tree Fruit Reserve
- EXHIBIT 19: Subpoena Duces Tecum, with Attached Proof of Service, to Albert Peterson, Director, Tree Fruit Reserve and Chairman, Peach Committee
- EXHIBIT 20: Subpoena Duces Tecum, with Attached Proof of Service, to Mickey George, Chairman, Nectarine Administrative Committee

- EXHIBIT 21: Subpoena Duces Tecum, with Attached Proof of Service, to Patrick Pinkham, Director, Tree Fruit Reserve and Chairman, Plum Commodity Committee
- EXHIBIT 22: Subpoena Duces Tecum, with Attached Proof of Service, to LeRoy Giannini, Past Chairman Nectarine Administrative Committee
- EXHIBIT 23: Subpoena Duces Tecum, with Attached Proof of Service, to Gary Van Sickle, CTFA Supervising Field Agent
- EXHIBIT 24: Subpoena Duces Tecum, with Attached Proof of Service, to Byron Hirata, Supervisor, Shipping Point Inspector
- EXHIBIT 25: Subpoena Duces Tecum, with Attached Proof of Service, to Dale Janzen, CTFA Field Agent
- EXHIBIT 26: Subpoena Duces Tecum, to Dave Parker, CTFA Assistant Manager
- EXHIBIT 27: Declaration of Karen L. Tully, dated, October 24, 1989
- EXHIBIT 28: Letter from LeRoy G. Giannini to Virgil Rasmussen and Albert Peterson, dated March 29, 1989
- EXHIBIT 29: Minutes, Executive Committee, Tree Fruit Reserve, dated No-

vember 15, 1988 (Duplicate of Exhibit 165)

EXHIBIT 30: Articles of Incorporation and By-Laws, Tree Fruit Reserve

(A): Auto Purchase Contract by Janzen For Buyer Tree Fruit Reserve, dated March 22, 1989

(B): State of California—Certificate That CTFA Is a Non-Filing Corporation

(C): Reimbursement Agreement Between TFR and CTFA, Dated March 30, 1989

EXHIBIT 31: STIPULATED RULE-MAKING RECORD RE: 1988 MATURITY AND SIZE REGULATIONS—PEACHES, PLUMS AND NECTARINES:

(A): Proposed Rule—Size Increases & Maturity Tables (Nectarines), April 18, 1988

(B): Interim Final Rule (Nectarines), Size & Maturity, May 27, 1988

(C): Proposed Rule—Re: Size Increase & Maturity (Plums), April 8, 1988

(D): Recommended & Extension of Time to

Comment on Plum Size Increase, April 25, 1988

(E): Interim Final Rule—Plums. No Plum Size Increase Maturity Tables, May 27, 1988

(F): Proposed Rule—Peaches. Size & Maturity, April 18, 1988

(G): Interim Final Rule—Peaches. Size & Maturity, May 27, 1988

(H): Memo From Kimmel To Scanlon Re: Committee Meeting, May 20, 1987

(I): Memo From Kimmel To Cioffi—NAC Meeting Report & Export Meeting Report, September 24, 1987

(J): Memo From Kimmel to Cioffi Re: Nectarine Size Meeting, October 20, 1987

(K): Memo From Kimmel to Cioffi Re: NAC Meeting, December 15, 1987

(L): Memo From Kimmel to Cioffi Re: NAC Meeting, May 9, 1988

- (M): Memo From Kimmel to Cioffi Re: Plum Meeting, December 11, 1987
- (N): Memo From Kimmel to Cioffi Re: Plum Meeting, May 9, 1988
- (O): Memo From Kimmel to Cioffi Re: Peach Meeting, December 16, 1987
- (P): Memo From Kimmel to Cioffi Re: Peach Meeting, May 13, 1988
- (Q): Minutes NAC Meeting, May 7, 1987
- (R): Minutes NAC Meeting, December 9, 1987
- (S): Minutes NAC Meeting, May 5, 1988
- (T): Minutes—Plum Meeting, May 6, 1987
- (U): Minutes—Plum Meeting, December 9, 1987
- (V): Minutes—Plum Meeting, May 4, 1988
- (W): Minutes—Peach Meeting, May 7, 1987
- (X): Minutes—Peach Meeting, December 8, 1987

- (Y): Minutes—Peach Meeting, May 5, 1988
- (Z): Minutes—Nectarine Sizing Sub-Committee, October 14, 1987
- (AA): Minutes—Nectarine Sizing Sub-Committee, November 16, 1987
- (BB): Minutes—Plum Sizing Sub-Committee, February 10, 1987
- (CC): Minutes—Plum Sizing Sub-Committee, November 4, 1987
- (DD): Minutes—Plum Sizing Sub-Committee, November 12, 1987
- (EE): Minutes—Plum Sizing Sub-Committee, November 17, 1987
- (FF): Minutes—Plum Sizing Sub-Committee, November 30, 1987
- (GG): Comments Submitted on Interim Final Rules, July 6, 1988
- (HH): Comments Submitted Re: Nectarines & Peach Proposed Rules, May 18, 1988

- (II): Comments Submitted
Re: Plums, January
Through May, 1988
- (JJ): Memo From Boyle—
Re: Work Plan For
Size Changes & Ma-
turity, January 29,
1988
- (KK): Memo From Cioffi to
Brader—Re: Proposed
Plum Size Increase &
Maturity, February
18, 1988
- (LL): Memo From Cioffi to
Brader—Re: Proposed
Amendment to Size &
Regulations for Peac-
hes, April 11, 1988
- (MM): Memo From Cioffi to
Brader—Re: Interim
Final Rule (Plums),
May 12, 1988
- (NN): Memo From Cioffi to
Brader—Re: Interim
Rule to Increase Size
& Maturity (Nectar-
ines), May 23, 1988
- (OO): Memo From Cioffi to
Brader—Re: Maturity
& Size (Peaches) In-
terim Final Rule, May
23, 1988

- (PP): Marketing Policy State-
ment (1988) From Tree
Fruit Committees
- (QQ): Additional Comments
To Proposed Rules on
Size Requirements and
Clarification Of Matur-
ity Regulations For
Plums
- (RR): Nectarine—Memoran-
dum from Cioffi to
Brader, Dated: April 11,
1988 and Informal Doc-
ket Review Memoran-
dum of April 13, 1988
- (SS): Peaches—Informal
Docket Review Memo-
randums of April 13,
1988 and May 24, 1988
- (TT): Plums—Informal Doc-
ket Review Memoran-
dums of April 1, 1988 and
May 24, 1988
- (UU): Plums—Documents Re-
garding Extension Of
Time For Comments
 - 1) Letter From Brian
Leighton Dated:
April 6, 1988
 - 2) Memorandum From
Cioffi To Brader,
Dated: April 13, 1988

- 3) Informal Docket Review Memorandum,
Dated: April 18, 1988

(VV): Folder Consisting Of:

- 1) 1987 Plum Minimum Maturity Requirements and Color Standards
- 2) Equivalent Plum Sizes: Maximum Number of Plums In 8-Pound Samples

EXHIBIT 32: STIPULATED RULE-MAKING RECORD RE: 1989 MATURITY AND SIZE REGULATIONS—PEACHES, PLUMS AND NECTARINES

- (A): Minutes—NAC, November 17, 1988
- (B): Minutes—NAC, May 3, 1989
- (C): Minutes—Plum Meeting, November 16, 1988
- (D): Minutes—Plum Committee Meeting, May 3, 1989
- (E): Minutes—Peach Meeting, November 17, 1988
- (F): Minutes—Peach Committee Meeting May 4, 1989

- (G): Letter From Kimmel to Cioffi—Re: NAC Meeting November 17, 1988, with enclosures, November 21, 1988
- (H): Memo From Kimmel to Cioffi—Re: Nectarine Sizing, April 6, 1989
- (I): Memo From Kimmel to Cioffi—Re: NAC Meeting May 10, 1989
- (J): Letter From Kimmel to Cioffi—Re: Plum Committee Meeting of November 16, 1988, November 21, 1988
- (K): Memo From Kimmel to Cioffi—Re: Plum Committee Meeting of May 3, 1989, May 8, 1989
- (L): Agenda Peach Commodity Committee Meeting of November 17, 1988,
- (M): Memo From Kimmel to Cioffi—Re: Peach Committee Meeting of May 4, 1989, May 9, 1989
- (N): Referral of Proposed Rules to F.R.—Re: Maturity, Size, Variances, Containers for 1989 Season

- (O): Interim Final Rule to Relax Size Requirements for Nectarines—M.O. 916 California Nectarines for 1989 Season, April 24, 1989
- (P): Memo from Cioffi to Brader—Re: Size Increases & Maturity, April 11, 1988
- (Q): Letter to Brader From Tracy, Deputy Director—Re: Issues of Concern Re Proposed Rules April 21, 1989
- (R): Letter From Cioffi to Brader—Re: Relax Size Requirements For Certain Varieties Nectarines, April 24, 1989
- (S): Letter From Brader to Byrne—Re: Interim Final Rule For Size Requirements for Certain Varieties of Nectarines, April 25, 1989
- (T): Interim Final Rule—Re: Nectarine Sizing, April 27, 1989
- (U): Memo From Cioffi to Brader Recording Approval of Final Rule for Maturity, Size Variances and Con-

- tainer for 1989, May 15, 1989
- (V): Approval of Final Rule—Re: Maturity, Size, Variance, Container, June 23, 1989
- (W): Letter From Kimmel to Crocker from AMS With Size Regulations, July 7, 1989
- (X): Work Plan to Change Size, Maturity and Container for Nectarines, Plums, Peaches—December 22, 1988
- (Y): Letter From Cioffi to Brader—Re: Approval of Amending Rules Re: Size, Maturity, Variances and Container, March 24, 1989
- (Z): Proposed Rules—Nectarines 1989, April 7, 1989
- (AA): Proposed Rules—Peaches and Plums 1989, April 7, 1989
- (BB): Final Rule—Nectarines, Plums, Peaches for 1989, July 3, 1989
- (CC): Minutes—Nectarine & Plum Sizing Sub-Committee, September 26, 1988

- (DD): Minutes—Plum Sizing Sub-Committee, October 12, 1988
- (EE): Minutes—Nectarine Sizing Sub-Committee, April 6, 1989
- (FF): Various Letters—Re: Modification May Glo Sizing, March 30, 1989
- (GG): Final Report of California Summer Fruits Retailer Research (Thuerk Pro-Con Company Report), California Tree Fruit Agreement May 1988
- (HH): Article, Re: Pest Control - Food Safety, Fall 1988
- (II): Hale Group Study Re: Foodservice Market Research, November 1988
- (JJ): Rules and Regulations (Nectarines), Amendments to the Size Requirements and Revision of the Maturity Regulations, March 27, 1989
- (KK): Rules and Regulations (Plums)—Relaxation of Size Requirements and Revision of Maturity Regulations, March 27, 1989

- (LL): Rules and Regulations (Peaches)—Amendments to the Size Requirements and Revision of the Maturity Regulations, March 27, 1989
- (MM): Additional Comments To Proposed Rules
- (NN): Attachment To Exhibit 32(A)
- (OO): Letter to Johnathan Fields From Grand Union, Dated: October 31, 1988
- (PP): Minutes—Peach Commodity Committee Of November 17, 1988
- (QQ):

EXHIBIT 33:

STIPULATED RULE-MAKING RECORD RE: ADVERTISING ASSESSMENTS FOR PEACHES, PLUMS AND NECTARINES

- (A): Federal Register, Vol. 54, No. 138, Page 30365, Final Rule—Expense and Assessment Rates—Nectarines, Peaches, Plums, July 20, 1989
- (B): Federal Register, Vol. 54, No. 120, Page 26382, Proposed Rule—Expense and Assessment Rates—Re: Nectarines,

Peaches, Plums, June 23, 1989

- (C): Budget NAC—March 1, 1988—February 28, 1989
- (D): NAC Meeting Report of May 5, 1988, May 9, 1988.
- (E): Budget Plum Commodity Committee—March 1, 1988—February 28, 1989
- (F): Memo From Kimmel to Cioffi Re: Plum Commodity Committee Meeting Report of May 4, 1988, May 9, 1988
- (G): Budget Peach Commodity Committee—March 1, 1988—February 28, 1989
- (H): Memo From Kimmel to Cioffi Re: Peach Commodity Committee Meeting Report of May 5, 1988, May 13, 1988
- (I): Memo From Scanlon to Brader Re: Expenses and Assessment Rates For Specified Orders, July 7, 1988
- (J): Informal Docket Review Re: Expenses Assesment Rates for Nectarines, Plums and Peaches, July 13, 1988
- (K): Memo from Scanlon to Brader Re: Expenses and

Assessment Rates for Specified Orders, June 2, 1988

- (L): Federal Register, Vol. 53, No. 119, page 23243, Proposed Rules for Nectarines and Peaches Grown in California, June 21, 1988
- (M): Federal Register, Vol. 53 No. 138, Page 27151, Rules and Regulations for Expenses and Assessment Rates for Specified Marketing Orders, July 19, 1988
- (N): Minutes—Peach Commodity Committee, May 7, 1980
- (O): Minutes—Peach Commodity Committee, November 20, 1980
- (P): Minutes—Peach Commodity Committee, May 6, 1981
- (Q): Minutes—Peach Commodity Committee, November 19, 1981
- (R): Minutes—Peach Commodity Committee, November 18, 1982
- (S): Minutes—Peach Commodity Committee, May 4, 1983
- (T): Minutes—Peach Commodity Committee, December 1, 1983

- (U): Minutes—Peach Commodity Committee, May 3, 1984
- (V): Minutes—Peach Commodity Committee, November 15, 1984
- (W): Minutes—Peach Commodity Committee, May 8, 1985
- (X): Minutes—Peach Commodity Committee, November 14, 1985
- (Y): Minutes—Peach, Plum and Nectarine Commodity Committee, May 8, 1986, May 9, 1986
- (Z): Minutes—Peach Commodity Committee, November 20, 1986
- (AA): Minutes—Peach Commodity Committee, May 7, 1987
- (BB): Minutes—Peach Commodity Committee, December 8, 1987
- (CC):
- (DD):
- (EE): Minutes—Peach Commodity Committee, May 5, 1988
- (FF): Minutes—Peach Commodity Committee, November 17, 1988
- (GG): Minutes—Peach Commodity Committee, May 4, 1989

- (HH): Memo from Blackburn to Doyle Re: Peach Commodity Committee Meeting, May 26, 1982
- (II): Memo From W.B. Blackburn to Doyle Re: Peach Commodity Committee Meeting, December 21, 1982
- (JJ): Memo From Muck to Doyle Re: Peach Commodity Committee Meeting, December 22, 1983
- (KK): Memo From Muck to Doyle Re: Peach Co-mmodity Committee Meeting, June 7, 1984
- (LL): Memo From Muck to Doyle Re: Parity Clarification, Nectarines and Peaches, October 5, 1984
- (MM): Memo from Blackburn to Doyle Re: Peach Commodity Committee Meeting, November 30, 1984
- (NN): Memo From Blackburn to Doyle Re: Peach Commodity Committee Meeting, May 10, 1985
- (OO): Memo From Blackburn to Doyle Re: Peach Commodity Committee Meeting, June 5, 1985

- (PP): Memo From Muck to Doyle
Re: Peach Commodity Com-
mittee Meeting, December 4,
1985
- (QQ): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, May 13, 1986
- (RR): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, December 5,
1986
- (SS): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, December
16, 1987
- (TT): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, May 13, 1988
- (UU): Memo From Kimmel to Cioffi
Re: Peach Commodity Com-
mittee Meeting, November
21, 1988
- (VV): Recommendations Of The
Plum Commodity Committee
For 1989 Season and Sup-
porting Documentation
- (WW): Minutes—Nectarine Admin-
istrative Committee and
Supporting Documentation,
May 3, 1989
- (XX): Memorandum From Kimmel
To Cioffi, Re: Administrative

- Committee Meeting Of May
3, 1989
- (YY): Memorandum From Kimmel
To Cioffi, Re: Plum Com-
modity Committee Meeting
Of May 3, 1989
- (ZZ):
- (AAA): Attachments To Exhibit
33(UU), Pages 5 and 6 Tr.
2632
- (BBB): Index of Exhibits filed in
Wileman I hearing (Ex. 5,6)
[assessment rulemaking rec-
ord with respect to Necta-
rines and Plums]. For clarity
of understanding, Exhibit
33(A) through 33 (AAA) of
Wileman II, contain the
peach assessments from pre-
sent all the way back to the
1980 rule making record, as
well as the plum and necta-
rines from present back to
1987. To get Plums and
Nectarines from 1987 farther
backwards in time, one must
look at Exhibit 33 (BBB),
which is an index of docu-
ments in evidence in the
Wileman/Kash I case, which
index was marked as Exhibit
5C in the Wileman/Kash I
hearing.

- EXHIBIT 34: Waiver of Notice and Consent to Holding of First Meeting of Stip. as being *all* Directors of Tree Fruit Reserve, A California Corporation they had
- EXHIBIT 35: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, November 8, 1957
- EXHIBIT 36: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 11, 1958
- EXHIBIT 37: Minutes—Executive Committee, Tree Fruit Reserve, November 20, 1958
- EXHIBIT 38: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 21, 1958
- EXHIBIT 39: Minutes—Board of Directors, Tree Fruit Reserve, 1958-1959, November 21, 1958
- EXHIBIT 40: Minutes—Board of Directors, Tree Fruit Reserve, 1957-1958, April 23, 1958
- EXHIBIT 41: Minutes—Board of Directors, Tree Fruit Reserve, 1958-1959, April 23, 1958
- EXHIBIT 42: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 11, 1959
- EXHIBIT 43: Minutes—Executive Committee, Tree Fruit Reserve, A

- California Corporation, April 20, 1959
- EXHIBIT 44: Minutes—Board of Directors, Tree Fruit Reserve, 1958-1959, April 23, 1959
- EXHIBIT 45: Minutes—Board of Directors, Tree Fruit Reserve, 1959-1960, April 23, 1959
- EXHIBIT 46: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, August 11, 1959
- EXHIBIT 47: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, October 15, 1959
- EXHIBIT 48: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, December 10, 1959
- EXHIBIT 49: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 9, 1960
- EXHIBIT 50: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 14, 1960
- EXHIBIT 51: Minutes—Board of Directors, Tree Fruit Reserve, 1959-1960, April 27, 1960

- EXHIBIT 52: Minutes—Board of Directors, Tree Fruit Reserve, 1960-1961, April 27, 1960
- EXHIBIT 53: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, September 9, 1960
- EXHIBIT 54: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, December 2, 1960
- EXHIBIT 55: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 7, 1961
- EXHIBIT 56: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 25, 1961
- EXHIBIT 57: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, April 27, 1961
- EXHIBIT 58: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1961-1962, April 27, 1961
- EXHIBIT 59: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, February 13, 1962
- EXHIBIT 60: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 13, 1962
- EXHIBIT 61: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 23, 1962

- EXHIBIT 62: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1961-1963, April 27, 1962
- EXHIBIT 63: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1962-1963, April 27, 1962
- EXHIBIT 64: Minutes—Annual Meeting of Member, Tree Fruit Reserve, February 28, 1963
- EXHIBIT 65: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 25, 1963
- EXHIBIT 66: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1962-1963, May 1, 1963
- EXHIBIT 67: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1963-1964, May 1, 1963
- EXHIBIT 68: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1963-1964, December 17, 1963
- EXHIBIT 69: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 5, 1964
- EXHIBIT 70: Minutes—Executive Committee, Tree Fruit Reserve, A California Corporation, April 27, 1964

- EXHIBIT 71: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1963-1964, May 1, 1964
- EXHIBIT 72: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1964-1965, May 1, 1964
- EXHIBIT 73: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1964-1965, November 6, 1964
- EXHIBIT 74: Minutes—Board of Directors, Tree Fruit Reserve, A California Corporation, 1964-1965, November 20, 1964
- EXHIBIT 75: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 10, 1965
- EXHIBIT 76: Minutes—Joint Meeting Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 26, 1965
- EXHIBIT 77: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, April 30, 1965
- EXHIBIT 78: Minutes—Annual Meeting of Member, Tree Fruit Reserve, February 8, 1966
- EXHIBIT 79: Minutes—Joint Meeting Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 25, 1966

- EXHIBIT 80: Minutes—Joint Meeting Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, November 16, 1966
- EXHIBIT 81: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 14, 1967
- EXHIBIT 82: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, April 26, 1967
- EXHIBIT 83: Agenda, Old Control Committee & Tree Fruit Reserve, May 2, 1967
- EXHIBIT 84: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, 1966-1967, May 2, 1967
- EXHIBIT 85: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, 1967-1968, May 2, 1967
- EXHIBIT 86: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, July 18, 1967
- EXHIBIT 87: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, November 28, 1967
- EXHIBIT 88: Minutes—Joint Meeting Advisory Committee & Executive Com-

- mittee, Tree Fruit Reserve, February 14, 1968
- EXHIBIT 89: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 14, 1968
- EXHIBIT 90: Minutes—Joint Meeting Advisory Committee & Executive Committee, Tree Fruit Reserve, April 24, 1968
- EXHIBIT 91: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, 1967-1968, April 26, 1968
- EXHIBIT 92: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve, 1968-1969, April 26, 1968
- EXHIBIT 93: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 11, 1969
- EXHIBIT 94: Minutes—Management Committee Advisory Committee & Executive Committee, Tree Fruit Reserve, April 24, 1969
- EXHIBIT 95: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve—1968-1969, April 30, 1969
- EXHIBIT 96: Minutes—Joint Meeting Control Committee & Board of Directors, Tree Fruit Reserve—1969-1970, April 30, 1969

- EXHIBIT 97: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 10, 1970
- EXHIBIT 98: Minutes—Management Services Committee, Advisory Committee, CTFA, Executive Committee, Tree Fruit Reserve, April 21, 1970
- EXHIBIT 99: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve—1970-1971, April 23, 1970
- EXHIBIT 100: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, November 13, 1970
- EXHIBIT 101: Minutes—Annual Meeting of Members, Tree Fruit Reserve, February 3, 1971
- EXHIBIT 102: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, February 3, 1971
- EXHIBIT 103: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 21, 1971
- EXHIBIT 104: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1970-1971, April 29, 1971

- EXHIBIT 105: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1971-1972, April 29, 1971
- EXHIBIT 106: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 19, 1972
- EXHIBIT 107: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1971-1972 May 2, 1972
- EXHIBIT 108: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 2, 1972
- EXHIBIT 109: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1972-1973, May 2, 1972
- EXHIBIT 110: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, October 27, 1972
- EXHIBIT 111: Minutes—Management Services Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, April 23, 1973
- EXHIBIT 112: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 1, 1973

- EXHIBIT 113: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1972-1973, May 1, 1973
- EXHIBIT 114: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1973-1974, May 1, 1973
- EXHIBIT 115: Minutes—Management Service Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, December 6, 1973
- EXHIBIT 116: Minutes—Management Service Committee, Advisory Committee, CTFA & Executive Committee, Tree Fruit Reserve, May 7, 1974
- EXHIBIT 117: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 16, 1974
- EXHIBIT 118: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1973-1974, May 16, 1974
- EXHIBIT 119: Minutes—Joint Meeting Control Committee, CTFA & Board of Directors, Tree Fruit Reserve, 1974-1975, May 16, 1974
- EXHIBIT 120: Minutes—Management Services Committee, Advisory Committee, CTFA, Executive Committee, Tree Fruit Reserve, November 13, 1974

- EXHIBIT 121: Minutes—Management Services Committee, Advisory Committee, CTFA, Executive Committee, Tree Fruit Reserve, Decemer 11, 1974
- EXHIBIT 122: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 21, 1975
- EXHIBIT 123: Minutes—Joint Meeting, Control Committee, California Tree Fruit Agreement & Board of Directors, Tree Fruit Reserve, 1975-1976, September 19, 1975
- EXHIBIT 124: Minutes—Annual Meeting of Members, Tree Fruit Reserve, November 10, 1976
- EXHIBIT 125: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve for 1975-1976, November 10, 1976
- EXHIBIT 126: Minutes—Control Committee, CTFA & Board of Directors, Tree Fruit Reserve for 1976-1977, November 10, 1976
- EXHIBIT 127: Minutes—Management Services and Executive Committee, Tree Fruit Reserve, May 3, 1977
- EXHIBIT 128: Minutes—Management Services Committee May 2, 1978
- EXHIBIT 129: Minutes—Management Services Committee November 13, 1978

- EXHIBIT 130: Minutes—Management Services Committee May 7, 1979
- EXHIBIT 131: Minutes—Annual Meeting of Members, Tree Fruit Reserve, May 8, 1979
- EXHIBIT 132: Minutes—Management Services Committee October 10, 1979
- EXHIBIT 133: Minutes—Management Services Committee, November 26, 1979
- EXHIBIT 134: Minutes—Management Services Committee, May 6, 1980
- EXHIBIT 135: Minutes—Management Services Committee, September 17, 1980
- EXHIBIT 136: Minutes—Management Services Committee, October 7, 1980
- EXHIBIT 137: Minutes—Management Services Committee, November 18, 1980
- EXHIBIT 138: Minutes—Management Services Committee, March 3, 1981
- EXHIBIT 139: Minutes—Management Services Committee, May 5, 1981
- EXHIBIT 140: Minutes—Management Services Committee, September 30, 1981
- EXHIBIT 141: Minutes—Management Services Committee, November 17, 1981
- EXHIBIT 142: Minutes—Management Services Committee, May 4, 1982
- EXHIBIT 143: Minutes—Management Services Committee, September 10, 1982

- EXHIBIT 144: Minutes—Management Services Committee, November 16, 1982
- EXHIBIT 145: Minutes—Management Services Committee, May 3, 1983
- EXHIBIT 146: Minutes—Management Services Committee, July 11, 1983
- EXHIBIT 147: Minutes—Management Services Committee, September 19, 1983
- EXHIBIT 148: Minutes—Management Services Committee, October 21, 1983
- EXHIBIT 149: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 29, 1983
- EXHIBIT 150: Minutes—Management Services Committee, December 28, 1983
- EXHIBIT 151: Minutes—Management Services Committee, February 10, 1984
- EXHIBIT 152: Minutes—Management Services and Executive Committee Tree Fruit Reserve, May 1, 1984
- EXHIBIT 153: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 13, 1984
- EXHIBIT 154: Minutes—Management Services and Executive Committee Tree Fruit Reserve, May 6, 1985
- EXHIBIT 155: Minutes—Management Services and Executive Committee Tree Fruit Reserve, October 17, 1985

- EXHIBIT 156: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 12, 1985
- EXHIBIT 157: Minutes—Management Services and Executive Committee Tree Fruit Reserve, February 21, 1986
- EXHIBIT 158: Minutes—Management Services and Executive Committee Tree Fruit Reserve, May 6, 1986
- EXHIBIT 159: Minutes—Management Services and Executive Committee Tree Fruit Reserve, November 18, 1986
- EXHIBIT 160: Minutes—Management Services and Executive Committee Tree Fruit Reserve, February 25, 1987
- EXHIBIT 161: Minutes—Management Services, March 26, 1987
- EXHIBIT 162: Minutes—Tree Fruit Reserve and Management Services, May 5, 1987
- EXHIBIT 163: Minutes—Tree Fruit Reserve and Management Services, December 7, 1987
- EXHIBIT 164: Minutes—Management Services, May 3, 1988
- (A): Minutes—Tree Fruit Re-serve Executive Committee, Tree Fruit Reserve, August 11, 1988.
- EXHIBIT 165: Minutes—Tree Fruit Reserve, Dup of 29. November 15, 1988
- EXHIBIT 166: Minutes—Management Services, November 15, 1988

- EXHIBIT 167: Minutes—Tree Fruit Reserve, May 2, 1989
- EXHIBIT 168: Minutes—Management Services, May 2, 1989
- EXHIBIT 169: Minutes—Executive Committee, November 28, 1989
- (A): "TFR" Letter From Jon Field To TFR Directors, Setting Forth Request For A January 17, 1990 Full Board Meeting So As To Conduct A Retroactive Ratification of TFR Activities From 1980 Through 1989
- (B): Minutes—Full Board of Directors of Tree Fruit Reserve, January 17, 1990
- EXHIBIT 170: Tree Fruit Reserve November 18, 1957 Financial Statement
- EXHIBIT 171: Tree Fruit Reserve February 28, 1958 Financial Statement
- EXHIBIT 172: Tree Fruit Reserve October 31, 1958 Financial Statement
- EXHIBIT 173: Tree Fruit Reserve February 28, 1959 Financial Statement
- EXHIBIT 174: Tree Fruit Reserve October 31, 1959 Financial Statement
- EXHIBIT 175: Tree Fruit Reserve February 29, 1960 Financial Statement

- EXHIBIT 176: Tree Fruit Reserve, Audit, 1960-1961
- EXHIBIT 177: Tree Fruit Reserve, Audit, 1961-1962
- EXHIBIT 178: Tree Fruit Reserve, Audit, 1962-1963
- EXHIBIT 179: Tree Fruit Reserve, Audit, 1963-1964
- EXHIBIT 180: Tree Fruit Reserve, Audit, 1964-1965
- EXHIBIT 181: Tree Fruit Reserve, Audit, 1965-1966
- EXHIBIT 182: Tree Fruit Reserve, Audit, 1966-1967
- EXHIBIT 183: Tree Fruit Reserve, Audit, 1967-1968
- EXHIBIT 184: Tree Fruit Reserve, Audit, 1968-1969
- EXHIBIT 185: Tree Fruit Reserve, Audit, 1969-1970
- EXHIBIT 186: Tree Fruit Reserve, Audit, 1970-1971
- EXHIBIT 187: Tree Fruit Reserve, Audit, 1971-1972
- EXHIBIT 188: Tree Fruit Reserve, Audit, 1972-1973
- EXHIBIT 189: Tree Fruit Reserve, Audit, 1973-1974
- EXHIBIT 190: Tree Fruit Reserve, Audit, 1974-1975

- EXHIBIT 191: Tree Fruit Reserve, Audit, 1975-1976
- EXHIBIT 192: Tree Fruit Reserve, Audit, 1976-1977
- EXHIBIT 193: Tree Fruit Reserve, Audit, 1977-1978
- EXHIBIT 194: Tree Fruit Reserve, Audit, 1978-1979
- EXHIBIT 195: Tree Fruit Reserve, Audit, 1979-1980
- EXHIBIT 196: Tree Fruit Reserve, Audit, 1980-1981
- EXHIBIT 197: Tree Fruit Reserve, Audit, 1981-1982
- EXHIBIT 198: Tree Fruit Reserve, Audit, 1982-1983
- EXHIBIT 199: Tree Fruit Reserve, Audit, 1983-1984
- EXHIBIT 200: Tree Fruit Reserve, Audit, 1984-1985
- EXHIBIT 201: Tree Fruit Reserve, Audit, 1985-1986
- EXHIBIT 202: Tree Fruit Reserve, Audit, 1986-1987
- EXHIBIT 203: Tree Fruit Reserve, Audit, 1987-1988
- EXHIBIT 204: Tree Fruit Reserve, Audit, 1988-1989

- EXHIBIT 205: California Tree Fruit Agreement, Audit, 1979-1980
- EXHIBIT 206: California Tree Fruit Agreement, Audit, 1980-1981
- EXHIBIT 207: California Tree Fruit Agreement, Audit, 1981-1982
- EXHIBIT 208: California Tree Fruit Agreement, Audit, 1982-1983
- EXHIBIT 209: California Tree Fruit Agreement, Audit, 1983-1984
- EXHIBIT 210: California Tree Fruit Agreement, Audit, 1984-1985
- EXHIBIT 211: California Tree Fruit Agreement, Audit, 1985-1986
- EXHIBIT 212: California Tree Fruit Agreement, Audit, 1986-1987
- EXHIBIT 213: California Tree Fruit Agreement, Audit, 1987-1988
- EXHIBIT 214: California Tree Fruit Agreement, Audit, 1988-1989
- EXHIBIT 215: Subpoena Ad Testificandum To Ray Piciotta, Former CTFA Marketing Director
- EXHIBIT 216: Subpoena Ad Testificandum, with Attached Proof of Service To Karen Tully
- EXHIBIT 217: Subpoena Ad Testificandum, with Attached Proof Of Service To Virgil Rasmussen, Past President, Tree Fruit Reserve and

Chairman, Control Committee,
CTFA

- EXHIBIT 218: Subpoena Ad Testificandum, with Attached Proof Of Service To LeRoy Giannini, Past President, Nectarine Administrative Committee
- EXHIBIT 219: Subpoena Ad Testificandum, with Attached Proof Of Service To Byron Hirata, Shipping Point Inspection Area Supervisor
- EXHIBIT 220: Subpoena Ad Testificandum, with Attached Proof Of Service To Jonathan Field, CTFA Manager and Secretary-Treasurer, Tree Fruit Reserve
- EXHIBIT 221: Subpoena Ad Testificandum, with Attached Proof Of Service To David Parker, Assistant Manager, CTFA
- EXHIBIT 222: Subpoena Ad Testificandum, with Attached Proof Of Service To Ann Stolz, CTFA Bookkeeper
- EXHIBIT 223: Subpoena Ad Testificandum, with Attached Proof Of Service To Dawn Rau, Grant Bennett and Associates
- EXHIBIT 224: Subpoena Ad Testificandum, with Attached Proof Of Service To Karen Jackson, CTFA Secretary
- EXHIBIT 225: Subpoena Ad Testificandum, with Attached Proof Of Service To

Albert Peterson, President, Tree Fruit Reserve and Chairman, Peach Committee

- (A): Subpoena Ad Testificandum, with Attached Proof Of Service To Patrick Pinkham, Director Tree Fruit Reserve and Chairman, Plum Committee
- (B): Subpoena Ad Testificandum, with Attached Proof Of Service To Ed Brown, Shipping Point Inspection
- (C): Subpoena Ad Testificandum, with Attached Proof Of Service To Gary Van Sickle, CTFA Supervising Field Agent
- (D): Subpoena Ad Testificandum, with Attached Proof Of Service To Dale Janzen, CTFA Field Agent
- EXHIBIT 226: Subpoena Ad Testificandum, with Attached Proof Of Service To Kirt Kimmel, Agricultural Marketing Service
- EXHIBIT 227: Subpoena Ad Testificandum, with Attached Proof Of Service To Carl Blackstone, Assistant U.S. Attorney

- EXHIBIT 228: Letter From Jonathan Field To Don and Lionel Serimian Dated June 21, 1989
- (A): Field Report of Pete Thiesen Re: D & L Serimian CTFA Violations Dated June 13, 1989
- (B): Field Notes of Sonnie Robinson Re: D & L Serimian CTFA Violations Dated June 13, 1989
- (C): Field Notes of Edward Brown Re: D & L Serimian CTFA Violations Dated June 13, 1989
- (D): Field Notes of Edward Brown Re: D & L Serimian CTFA Violations Dated June 14, 1989
- EXHIBIT 229: Letter to Robert Simmons (OF USDA General Counsel's Office) From Jon Field Re: Kash, Inc., Dated June 22, 1989
- EXHIBIT 230: Letter From James Andrews To Kash, Inc. Dated July 13, 1989
- EXHIBIT 231: Letter From Jonathan Field on TFR Letterhead Seeking Support To Oppose Baker's Ruling Dated July 7, 1989
- EXHIBIT 232: Letter From Charles Brader To Patrick Pinkham Indicating Intent To Publish Color Chips

- For Plums Dated December 4, 1987
- EXHIBIT 233: Letter From Charles Brader To Albert Peterson Re: Intent To Publish Color Chips (Peaches) Dated December 4, 1987
- EXHIBIT 234: Letter From Jonathan Field To Nectarine Handlers Re: Size Elimination, Dated October 20, 1987
- EXHIBIT 235: Letter from Richard Peterson, Manager/President of CTFA To LeRoy Giannini Dated July 23, 1985 Re Maturity (Color Chip) Changes Being Interpreted As Volume Control
- EXHIBIT 236: Letter From Ito Packing To R.V. Pisciotta Dated April 13, 1988 Complaining About Insult To Red Jim Nectarines
- EXHIBIT 237: Letter From CTFA To Jim Ito Dated April 19, 1988 Apologizing Re Red Jim Nectarines
- EXHIBIT 238: Bill and Check For Charter Plane For March 15, 1989 Funeral
- EXHIBIT 239: Lucky Tour Documents For June 21, 1989 to June 22, 1989
- EXHIBIT 240: Corrections To Transcript Submitted By Judge Baker
- EXHIBIT 241: Motion—Court To Take Official Notice of 1988 Hearing

- EXHIBIT 242: Judge Baker Notice Of Intent to Incorporate The 1988 Hearing As Part Of The 1990 Hearing
- EXHIBIT 243: Judge Baker's Request (To The Office of General For USDA To Enforce The Subpoenas Duces Tecums on Tree Fruit Reserve, Albert Peterson, And David Parker, Dated November 7, 1989
- EXHIBIT 244: U.S. Attorney's Application For OSC In Federal Court, and Federal Court Judge Price's Order Compelling Production of Documents Listed In Administrative Subpoena By Tree Fruit Reserve, Albert Peterson, and David Parker
- EXHIBIT 245: TFR Agreeing To Comply With Subpoenas After Receipt of Federal Court OSC Order
- EXHIBIT 246: Expert Witness Dr. Julian Whaley's Analysis of Sun Grand Nectarines, and His Data Summary Re: Color Comparisons of 1987 Color Chips and 1989 Color Chips.
- EXHIBIT 247: 1989 Color Chips (Black Cover Booklet Of Chips), Analyzed By Dr. Julian Whaley
- EXHIBIT 248: List of 1989 Color Chips Matched To Sun Grand Nectarines By Ed Brown, S.P.I. Supervisor, Which Sun Grand Nectarines Were Pre-

- viously Analyzed By Dr. Julian Whaley
- EXHIBIT 249: Domestic Stock Statement of Tree Fruit Reserve, Signed April 30, 1989, Effective April 30, 1989
- (A): Domestic Stock Statement of Tree Fruit Reserve, Signed April 8, 1988, Effective April 30, 1988
- (B): Domestic Stock Statement of Tree Fruit Reserve, Signed April 6, 1987, Effective April 30, 1987
- (C): Domestic Stock Statement of Tree Fruit Reserve, Signed April 16, 1986, Effective April 30, 1986
- (D): Domestic Stock Statement of Tree Fruit Reserve, Effective April 30, 1985
- (E): Domestic Stock Statement of Tree Fruit Reserve, Signed March 7, 1984, Effective April 30, 1984
- (F): Domestic Stock Statement of Tree Fruit Reserve, Signed March 7, 1983, Effective April 30, 1983
- (G): Domestic Stock Statement of Tree Fruit Reserve, Signed February 22, 1982, Effective April 30, 1982

- (H): Domestic Stock Statement of Tree Fruit Reserve, Signed January 26, 1981, Effective April 30, 1981
 - (I): Domestic Stock Statement of Tree Fruit Reserve, Signed April 2, 1980, Effective April 30, 1980
 - (J): Statement of Domestic Corporation for Tree Fruit Reserve, Signed April 17, 1979
 - (K): Statement of Domestic Corporation for Tree Reserve, Signed April 11, 1978
 - (L): Statement of Domestic Corporation for Tree Reserve, Signed June 29, 1977
 - (M): Statement of Domestic Corporation for Tree Reserve, Signed May 10, 1976
 - (N): Statement of domestic Corporation for Tree Reserve, Signed July 12, 1972
- EXHIBIT 250: Al Peterson's Personal Testimony Preparation Notes
- (A): Al Peterson's Personal Testimony Preparation Notes
- EXHIBIT 251: Agreement Between The (Federal) Commodity Committees With The (California) Pear Zone

- EXHIBIT 252: List of Members And Alternates On The "Control Committee", 1989-1990 and 1990-1991
- EXHIBIT 253: List of Committee Members & Alternates for the Nectarine Administrative Committee, 1989-1990 and 1990-1991
- EXHIBIT 254: List of Committee Members & Alternates for the Pear, Plum, and Peach Commodity Committees, 1989-1990 and 1990-1991
- EXHIBIT 255: Budget Peach Commodity Committee, For First Year March 1, 1989 Through February 28, 1990
- (A): Budget Nectarine Association Committee, For First Year March 1, 1989 Through February 28, 1990
 - (B): Budget Plum Commodity Committee, For First Year March 1, 1989 Through February 29, 1990
 - (C): Budget Peach Commodity Committee, For First Year March 1, 1988 Through February 28, 1989
 - (D): Budget Nectarine Administrative Committee, For First Year March 1, 1988 Through February 28, 1989
 - (E): Budget Plum Commodity Committee, For First Year

March 1, 1988 Through February 28, 1989

- (F): Budget Peach Commodity Committee, For First Year March 1, 1987 Through February 28, 1988
- (G): Budget Nectarine Administrative Committee, For First Year March 1, 1987 Through February 28, 1988
- (H): Budget Plum Commodity Committee, For First Year March 1, 1987 Through February 28, 1988
- (I): Budget Peach Commodity Committee, For First Year March 1, 1986 Through February 28, 1987
- (J): Budget Nectarine Administrative Committee, For First Year March 1, 1986 Through February 28, 1987
- (K): Budget Plum Commodity Committee, For First Year March 1, 1986 Through February 28, 1987
- (L): Budget Peach Commodity Committee, For First Year March 1, 1985 Through February 28, 1986
- (M): Budget Nectarine Administrative Committee, For First

Year March 1, 1985 Through February 28, 1986

- (N): Budget Plum Commodity Committee, For First Year March 1, 1985 Through February 28, 1986
- EXHIBIT 256: CTFA Advertising Varietal Chart (Which Includes The Red Jim)
- EXHIBIT 257: VCR Tape
- EXHIBIT 258: Excerpts From Transcripts of Gerawan 15(A) Hearing
- EXHIBIT 259: CTFA's Peach Advertising Hand-out (Which Document Was Also Respondent's Exhibit 57 in The Gerawan Earlier 15(A) Hearing).
- EXHIBIT 260: Prima Stickers
- EXHIBIT 261: Tree Fruit Reserve Bylaws Effective February 1977 (These Same Bylaws Are Also A Part Of The Exhibit 30 Package Hereinabove).
 - A: Bylaws Effective 1975
 - B: Bylaws Effective 1957 At Inception Of Tree Fruit Reserve
- EXHIBIT 262: 1987 Color Chips (Green Cover Booklet Of Chips), Analyzed By Dr. Julian Whaley
- EXHIBIT 263: Photo—Minolta Electronic Light Refraction Testing Device

- EXHIBIT 264: Photo—Minolta Electronic Light Refraction Testing Devis—Light Source
- EXHIBIT 265: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 266: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 267: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 268: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 269: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 270: Photo of Sun Grand Nectarines Examined By Dr. Whaley
- EXHIBIT 271: Photo of Pressure Tester Used By Dr. Julian Whaley at USDA's Lab
- EXHIBIT 272: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1988 Through February 28, 1989.
- EXHIBIT 273: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1987 Through February 28, 1988.
- EXHIBIT 274: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1986 Through February 28, 1987.

- EXHIBIT 275: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1985 Through February 28, 1986.
- EXHIBIT 276: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1984 Through February 28, 1985.
- EXHIBIT 277: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1983 Through February 28, 1984.
- EXHIBIT 278: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1978 Through February 28, 1979.
- EXHIBIT 279: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1977 Through February 28, 1978.
- EXHIBIT 280: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1976 Through February 28, 1977.
- EXHIBIT 281: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1975 Through February 28, 1976.
- EXHIBIT 282: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1974 Through February 28, 1975.

- EXHIBIT 283: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1973 Through February 28, 1974.
- EXHIBIT 284: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1972 Through February 28, 1973.
- EXHIBIT 285: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1971 Through February 28, 1972.
- EXHIBIT 286: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1970 Through February 28, 1971.
- EXHIBIT 287: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1969 Through February 28, 1970.
- EXHIBIT 288: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1968 Through February 28, 1969.
- EXHIBIT 289: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1967 Through February 28, 1968.
- EXHIBIT 290: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1966 Through February 28, 1967.

- EXHIBIT 291: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1965 Through February 28, 1966.
- EXHIBIT 292: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1964 Through February 28, 1965.
- EXHIBIT 293: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1963 Through February 28, 1964.
- EXHIBIT 294: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1962 Through February 28, 1963.
- EXHIBIT 295: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1961 Through February 28, 1962.
- EXHIBIT 296: Tree Fruit Reserve's IRS Tax Return Form 990, For Fiscal Year March 1, 1960 Through February 28, 1961.
- EXHIBIT 297: Index To The "Budget Approval Record" Which "Budgetary Record" Consists of Sub-Exhibits 297 (A) Through 297 (KK). Said Budget Approval Record [i.e., Exhibits 297 (A) Through 297 (KK)] Was Produced By Respondent in Response To "Orders of Production of Documents Number

26, 27, and 28". Said "Orders of Production" Are Set Forth Within Exhibit 13, and Are Also Identified and Discussed At Those Transcript Paragraphs Which Are Identified As Number 41, 42 and 43 Of The Transcript Of Hearing For The Date Of February 6, 1990, at pages 2642 through 2644. Said "Budget Approval Record" Is The Entire Budget, and All Supporting Documents Thereto, Which The Nectarine, Plum, and Peach Committees Submitted To The Secretary Of Agriculture For His Approval Each Harvest Season From 1980 Through 1989.

- (A): 1988 Report On Research Projects For California Peaches, Plums & Nectarines
- (B): 1987 Report On Research Projects For California Peaches, Plums & Nectarines
- (C): 1986 Report On Research Projects For California Peaches, Plums & Nectarines
- (D): 1985 Report On Research Projects For California Peaches, Plums & Nectarines
- (E): 1984 Report On Research Projects For California Peaches, Plums & Nectarines

(F): Qualitative Research Concerning The California Tree Fruit Agreement (July Through September, 1989)

- (G): 1) Field Representative Reports California Summer Fruits
- 2) California Summer Fruit Promotion Bulletin No. 2 - Period Ending June 13, 1980
- 3) California Summer Fruit Promotion Bulletin No. 3 - Period Ending June 27, 1980
- 4) California Summer Fruit Promotion Bulletin No. 4 - Period Ending July 11, 1980
- 5) California Summer Fruit Promotion Bulletin No. 5 - Period Ending July 25, 1980
- 6) California Summer Fruit Promotion Bulletin No. 6 - Period Ending August 8, 1980
- 7) California Summer Fruit Promotion Bulletin No. 7 - Period Ending August 22, 1980

- 8) California Summer Fruit
Promotion Bulletin No. 8
- Period Ending
September 5, 1980
- 9) California Summer Fruit
Promotion Bulletin No. 9
- Period Ending
September 19, 1980

(H): California Summer Fruits
Promotion Bulletin for 1981

- 1) California Summer Fruit
Promotion Bulletin No. 8
- Period Ending September 19, 1981
- 2) California Summer Fruit
Promotion Bulletin No. 7
- Period Ending September 5, 1981
- 3) California Summer Fruit
Promotion Bulletin No. 6
- Period Ending August 22, 1981
- 4) California Summer Fruit
Promotion Bulletin No. 5
- Period Ending August 8, 1981
- 5) California Summer Fruit
Promotion Bulletin No. 4
- Period Ending July 25, 1981
- 6) California Summer Fruit
Promotion Bulletin No. 3

- Period Ending July 11,
1981

- 7) California Summer Fruit
Promotion Bulletin No. 2
- Period Ending June 27,
1981
- 8) California Summer Fruit
Promotion Bulletin No. 1
- Period Ending June 13,
1981

(I): California Summer Fruits
Promotion Bulletin for 1982

- 1) California Summer Fruit
Promotion Bulletin No. 8
- Period Ending September 10, 1982
- 2) California Summer Fruit
Promotion Bulletin No. 7
- Period Ending August 27, 1982
- 3) California Summer Fruit
Promotion Bulletin No. 6
- Period Ending August 13, 1982
- 4) California Summer Fruit
Promotion Bulletin No. 5
- Period Ending July 30
1982
- 5) California Summer Fruit
Promotion Bulletin No. 4
- Period Ending July 4,
1982

- 6) California Summer Fruit Promotion Bulletin No. 3 - Period Ending July 2, 1982
- 7) California Summer Fruit Promotion Bulletin No. 2 - Period Ending June 18, 1982
- 8) California Summer Fruit Promotion Bulletin No. 1 - Period Ending June 4, 1982
- (J): California Summer Fruits Field Staff Promotion Bulletin for 1983
 - 1) California Summer Fruits Field Staff Bulletin No. 9 - Period Ending September 16, 1983
 - 2) California Summer Fruits Field Staff Bulletin No. 8 - Period Ending September 2, 1983
 - 3) California Summer Fruits Field Staff Bulletin No. 7 - Period Ending August 19, 1983
 - 4) California Summer Fruits Field Staff Bulletin No. 6 - Period Ending August 5, 1983

- 5) California Summer Fruits Field Staff Bulletin No. 5 - Period Ending July 22, 1983
- 6) California Summer Fruits Field Staff Bulletin No. 4 - Period Ending July 8, 1983
- 7) California Summer Fruits Field Staff Bulletin No. 3 - Period Ending June 24, 1983
- 8) California Summer Fruits Field Staff Bulletin No. 2 - Period Ending June 10, 1983
- 9) California Summer Fruits Field Staff Bulletin No. 1 - Period Ending May 27, 1983
- (K): California Summer Fruits Field Staff Bulletin for 1984
 - 1) California Summer Fruits Field Staff Bulletin No. 8 - Period Ending September 7, 1984
 - 2) California Summer Fruits Field Staff Bulletin No. 7 - Period Ending August 24, 1984
 - 3) California Summer Fruits Field Staff Bulletin No. 6 -

Period Ending August 10,
1984

- 4) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 27,
1984
- 5) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 13,
1984
- 6) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 29,
1984
- 7) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 15,
1984
- 8) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending June 1, 1984

(L): California Summer Fruits
Field Staff Bulletin for 1985

- 1) California Summer Fruits
Field Staff Bulletin No. 9 -
Period Ending September
20, 1985
- 2) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
6, 1985

- 3) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 23,
1985

- 4) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 9,
1985

- 5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 26,
1985

- 6) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 12,
1985

- 7) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 28,
1985

- 8) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 14,
1985

- 9) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending May 31,
1985

(M): California Summer Fruits
Field Staff Bulletin For 1986

- 1) California Summer Fruits
Field Staff Bulletin No. 9 -

Period Ending September
19, 1986

- 2) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
5, 1986
- 3) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 22,
1986
- 4) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 8,
1986
- 5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 25,
1986
- 6) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 11,
1986
- 7) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 27,
1986
- 8) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 13,
1986
- 9) California Summer Fruits
Field Staff Bulletin No. 1 -

Period Ending May 30,
1986

- (N): California Summer Fruits
Field Staff Bulletin For
1987
- 1) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending May 29,
1987
 - 2) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 12,
1987
 - 3) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 26,
1987
 - 4) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 10,
1987
 - 5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 24,
1987
 - 6) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 7,
1987
 - 7) California Summer Fruits
Field Staff Bulletin No. 7 -

Period Ending August 21,
1987

8) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
4, 1987

9) California Summer Fruits
Field Staff Bulletin No. 9 -
Period Ending September
18, 1987

10) California Summer Fruits
Field Staff Bulletin No. 10
- Period Ending October 2,
1987

(O): California Summer Fruits
Field Staff Bulletin For 1988

1) California Summer Fruits
Field Staff Bulletin No. 9 -
Period Ending September
23, 1988

2) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
9, 1988

3) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 26,
1988

4) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 12,
1988

5) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 29,
1988

6) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 15,
1988

7) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending July 1, 1988

8) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 7, 1988

9) California Summer Fruits
Field Staff Bulletin No. 1 -
Period Ending June 3, 1988

(P): California Summer Fruits
Field Staff Bulletin For 1989

1) California Summer Fruits
Field Staff Bulletin No. 8 -
Period Ending September
1, 1989

2) California Summer Fruits
Field Staff Bulletin No. 7 -
Period Ending August 18,
1989

3) California Summer Fruits
Field Staff Bulletin No. 6 -
Period Ending August 5,
1989

- 4) California Summer Fruits
Field Staff Bulletin No. 5 -
Period Ending July 21,
1989
 - 5) California Summer Fruits
Field Staff Bulletin No. 4 -
Period Ending July 7, 1989
 - 6) California Summer Fruits
Field Staff Bulletin No. 3 -
Period Ending June 23,
1989
 - 7) California Summer Fruits
Field Staff Bulletin No. 2 -
Period Ending June 9, 1989
 - 8) California Summer Fruits
Field Staff Bulletin No.1 -
Period Ending May 26,
1989
 - 9) Letter To all Committee
Members and All Sales
Desks From David S.
Parker, Dated: June 1,
1989
- (Q): California Summer Fruits
Proposed Promotional Bud-
get
- 1) Proposed Promotional
Budget 1986-1987
 - 2) Pear Commodity Commit-
tee Trail Promotional
Budget, 1985-1986

- 3) Pear Commodity Commit-
tee Trail Promotional
Budget, 1984-1985
 - 4) Pear Commodity Commit-
tee Trail Promotional
Budget, 1983-1984
 - 5) Pear Commodity Commit-
tee Trail Promotional
Budget, 1982-1983
 - 6) Pear Commodity Commit-
tee Trail Promotional
Budget, 1981-1982, Sub-
committee On Advertis-
ing And Promotion
 - 7) Pear Commodity Commit-
tee Trail Promotional
Budget, 1980-1981, Sub-
committee On Advertis-
ing And Promotion
- (R): 54th Annual Report of Cali-
fornia Tree Fruit Agreement
(1987)
- (S): 55th Annual Report of Cali-
fornia Tree Fruit Agree-
ment (1988)
- (T): A Communis Measure-
ment of the California Sum-
mer Fruits 1987 Advertising
Campaign
- (U): California Tree Fruit Agree-
ment, Foodservice Market
Research and Strategic

Direction—Executive Summary, By The Hale Group

(V): Executive Summary Consumer Purchasing of Fresh Fruit Within Kansas City—Summer 1987

(W): Minutes - Promotion and Research

- 1) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 7, 1980
- 2) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 29, 1989
- 3) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 2, 1989
- 4) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 16, 1988

- 5) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 16, 1988
- 6) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 4, 1988
- 7) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: December 8, 1987
- 8) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 19, 1986
- 9) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 13, 1985
- 10) Minutes—Nectarine Administrative Committee, Peach Commodity Com-

mittee and Plum Commodity Committee, Dated: May 7, 1985

- 11) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 14, 1984
- 12) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 2, 1984
- 13) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 4, 1983
- 14) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 30, 1983
- 15) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 6 1981

- 16) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 18, 1981
- 17) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 17, 1982
- 18) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: May 5, 1982
- 19) Minutes—Nectarine Administrative Committee, Peach Commodity Committee and Plum Commodity Committee, Dated: November 19, 1980
- 20) Minutes—Joint Meeting Plum, Peach and Nectarine Committees, Dated: May 7, 1986
- 21) Minutes— Joint Meeting Plum, Peach and Nectarine Committees, Dated: May 6, 1987

(X): Minutes & Reports - Various Subcommittees

- 1) 1981 - 1982 Ripening Bowl Income Statement
- 2) February 28, 1982, Recap Ripening Bowl Sales
- 3) Minutes—Subcommittee On Promotion, Dated: May 22, 1989
- 4) Minutes—Subcommittee On Advertising & Pro-motion, Dated: May 17, 1988
- 5) Minutes—Subcommittee On Promotion, Dated: December 5, 1984
- 6) Minutes—Subcommittee For Promotion and Research, Dated: March 28, 1984
- 7) Minutes—Stone Fruits Promotion Subcommittee, Dated: November 2, 1988
- 8) Minutes—Stone Fruits Promotion Subcommittee, Dated: March 23, 1988
- 9) Minutes—Stone Fruits Promotion Subcommittee, Dated: September 27, 1989
- 10) Minutes—Stone Fruits Promotion Subcommittee, Dated: March 30, 1989

- 11) Minutes—Stone Fruits Promotion Subcommittee, and Pear Subcommittee For Advertising and Promotion Dated: November 5, 1987
- 12) Minutes—Stone Fruits Promotion Subcommittee, Dated: March 26, 1987
- 13) Minutes—Stone Fruits Promotion Subcommittee, Dated: January 27, 1987
- 14) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: March 19, 1986
- 15) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: March 3, 1982
- 16) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: March 4, 1981
- 17) Minutes—Stone Fruits Subcommittee For Promotion And Research, Dated: February 28, 1980
- 18) Minutes—Subcommittee For Promotion And Research, Dated: March 6, 1985

- 19) Minutes—Subcommittee For Promotion And Research, Dated: April 6, 1983
 - 20) Minutes—Subcommittee For Promotion And Research, Dated: April 14, 1982
 - 21) Minutes—Research Subcommittee, Dated: February 17, 1988
 - 22) Minutes—Research Subcommittee, Dated: November 19, 1987
 - 23) Minutes—Research Subcommittee, Dated: April 16, 1987
 - 24) Minutes—Research Subcommittee, Dated: February 11, 1987
- (Y): 1) Industry Meeting To Discuss Economic Research, October 7, 1980
- 2) Minutes - Industry AD HOC Committee Economic Research, June 5, 1985
 - 3) Minutes - Industry AD HOC Committee Economic Research, October 30, 1985
- (Z): Folder Consisting Of:
- 1) Letter From Jonathan W. Field to Export Market Development Subcommittee

- Members, Dated: March 3, 1989
- 2) Exporting Quality Fruit Article, By Kerry Benson In Fruit Grower, Dated: February 1989
 - 3) Minutes - Export Market Development Subcommittee, Dated: March 16, 1989
 - 4) Minutes - Export Market Development Subcommittee, Dated: November 1, 1988
 - 5) Minutes—Nectarine Export Subcommittee, Dated: September 26, 1988
 - 6) Minutes—Nectarine Export Subcommittee, Dated: March 2, 1988
 - 7) Minutes—Nectarine Export Subcommittee, Dated: January 19, 1988
 - 8) Minutes—Nectarine Export Subcommittee, Dated: December 14, 1987
 - 9) Minutes—Nectarine Export Subcommittee, Dated: September 10, 1987

(AA): Folder Consisting Of:

- 1) U.S. Department of Agriculture Memorandum - From Fruit Branch, To Director,

Fruit and Vegetable Division,
Dated: July 30, 1979

- 2) Memorandum - From Fruit Branch, To Director, Fruit and Vegetable Division, Dated: July 26, 1979
- 3) Memorandum From Malvin E. McGaha, To William B. Blackburn, Dated: August 3, 1979
- 4) Advertising Update, Dated: May 15, 1979
- 5) Letter from Galen Geller To Robert Phillips, Dated: February 22, 1979
- 6) Letter form Robert Phillips To Galen Geller, Dated: February 20, 1979
- 7) Plum Forecast Proposal, 1978
- 8) USDA's Research Proposal To CTFA, Dated: February 22, 1979
- 9) University Of California, Office Of The Vice President, Agriculture & University Services Data Report No. 3158MH

- 10) University Of California, Office Of The Vice President, Agriculture & University Services Data Report No. 3255-H
- 11) Nectarine Administrative Committee - Market Development 1979 - 1980 Budget
- 12) 1979 - 1980 California Pear Budget
- 13) 1979 - 1980 California Stone Fruit Budgets
- 14) California Summer Fruits Ripening Bowl 1979 - 1980 Budget
- 15) Ripening Bowl Income Statement, March 1, 1978 to February 28, 1979
- 16) California Summer Fruits Ripening Bowl 1979 - 1980 Budget
- 17) Ripening Bowl Income Statement, March 1, 1979 to February 29, 1980
- 18) Peach Commodity Committee - 1979 Consumer Education Program
- 19) Plum Commodity Committee - 1979 Consumer Education Program

(BB): Folder Consisting Of:

- 1) Commodity Committee Proposed Market Development Budget 1980 - 1981
- 2) Commodity Committee Proposed Market Development Budget 1980 - 1981
- 3) Pear Commodity Committee Proposed Market Development Budget 1980 - 1981
- 4) Nectarine Commodity Committee Proposed Market Development Budget 1980 - 1981
- 5) USDA Cooperators Report To California Tree Fruit Agreement, Dated: December 31, 1980
- 6) California Tree Fruit Agreement Project On Pre and Post-Harvest Decay
- 7) Table 19
- 8) California Tree Fruit Agreement Annual Report - 1980
- 9) Final Report For 1980 To CTFA - Rootstocks and Tree Density Studies
- 10) 1980 - 1981 California Stone Fruit Budget
- 11) USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: August 8, 1980

- 12) USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: January 5, 1981
- 13) USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: June 22, 1981
- 14) USDA Memorandum - From: G.P. Muck, To: W.J. Doyle, Dated: March 10, 1981
- 15) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3154-MH, Project Title: Possible Relation of Nectarine Pox To Plant Hormone, Dated: May 9, 1980
- 16) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. CA-D POM-3365-H, Project Title: Rootstocks and Training Multidensity Orchards Dated: February 25, 1980
- 17) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3158-MH, Project Title:

Possible Relation of Nectarine Pox To Plant Hormone Dated: February 25, 1980

- 18) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. CA-D-POM 3365-H, Project Title: Surveying Clauses Of Nectarine Pox, Dated: February 25, 1980
- 19) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3158 MH, Project Title: Maturity vs. Quality Attributes Of Shipping Stone Fruits
- 20) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project Title: Peach Limb Sunburn Study
- 21) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. H-2567, Project Title: Stone Fruit Pest Management

- 22) University Of California Office Of The Vice President - Agriculture & University Services - Data For Project No. 3255-H, Project Title: Pre and Post-Harvest Decay Of Fresh Market Peaches, Plums and Nectarines, Dated: March 19, 1980
 - 23) USDA Science & Education Administration Research Proposal To CTFA - 1980, Dated: February 7, 1980
 - 24) Research - 1980
- (CC): Folder Consisting Of:
- 1) Nectarine Administrative Committee Market Development Proposed 1981-1982 Budget
 - 2) 1981-1982 California Stone Fruit Budget
 - 3) USDA Science & Education Administration Report On Fumigation Of Stone Fruits For Export, Dated: December 9, 1980
 - 4) Final Report For 1981 To CTFA - Nectarine Pox, UC Davis
 - 5) Peach Limb Sunburn Study - December 1980
 - 6) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: September 29, 1981 - Approval Of

Market Development and
Research 1981-1982 Season

- 7) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: September 30, 1981 - Approval Of Market Development and Research 1981-1982 Season
- 8) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: March 15, 1982 - Approval Of Medfly Research Project, 1981-1982 Season
- 9) Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Dated: September 29, 1981 - Approval Of Market Development and Research 1981-1982 Season
- 10) University Of California Office Of The Vice President - Agriculture & University Services, Project No. H-2567, Project Title Stone Fruit Pest Management: Evaluation Of Limb-Banding Techniques For Collection Of San Jose Scale Crawlers, Dated: January 27, 1981
- 11) University Of California Office Of The Vice President - Agriculture & University

Services, Project Title On
Constructing Inherently More
Efficient Peach & Nectarine
Factories

- 12) University Of California Office Of The Vice President - Agriculture & University Services, Project No. 3255-H, Project Title Pre and Post-Harvest Decay of Fresh Market Peaches, Plums and Nectarines, Dated: January 12, 1981
- 13) University Of California Office Of The Vice President - Agriculture & University Services, Project No. USDA-SEAAR Fruit Production Research, Project Title Embryo Culture Of Early-Maturing Hybrids For The Production Of Improved Early-Maturing Peach, Nectarine and Plum Varieties
- 14) USDA Work Unit/ Project No. 5202-20660-003, CTFA - January 19, 1981
- 15) The Japanese Market For Plums and Nectarines - A Research Proposal By Kr. Kirby S. Moulton, Dated: April 20, 1981

(DD): Folder Consisting Of:

- 1) Letter From W.B. Blackburn To GalenGeller, Dated: March 23, 1983
- 2) University Of California Office Of The Vice President - Agriculture & University Services, Project Title On Construction Inherently More Efficient Peach & Nectarine Factories
- 3) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CA-D-POM-3365-H, Project Title Surveying Causes Of Nectarine Pox, Dated:
- 4) University Of California Office Of The Vice President - Agriculture & University Services, Project Title: Evaluation Of The Physiology Efficiency Of Peach, Nectarine and Plum Frees In Different Orchard Systems, Dated: January 29, 1982
- 5) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CAD*-XXX-3346H, Project Title: On Constructing Inherently More

Efficient Peach & Nectarine Factories, Dated: January 29, 1982

- 6) University Of California Office Of The Vice President - Agriculture & University Services, Project Title: Fruit Tolerance To Alternate Insect Quarantine Treatments, Dated: January 29, 1982
- 7) University Of California Office Of The Vice President - Agriculture & University Services, Project No. 3255-H, Project Title: Pre & Post-Harvest Decay Of Fresh Market Peaches, Plums and Nectarines, Dated: December 22, 1981
- 8) University Of California Office Of The Vice President - Agriculture & University Services, Project No. H-3947, Project Title: Stone Fruit Pest Management: Timing Post-Bloom Treatments For Oriental Fruit Moth, Peach Twig Borer and San Jose Scale Using Predictive Phenology Models, Dated: January 29, 1982
- 9) University Of California Office Of The Vice President - Agri-

culture & University Services,
Project No. Pending, Project
Title: The Marketing OF
Selected Fruits In Pacific Rim
Countries, Dated: February 24,
1982

- 10) University Of California Office
Of The Vice President - Agri-
culture & University Services,
Project No. CAD*-XXX-
3346H, Project Title: On Con-
structing Inherently More
Efficient Peach & Nectarine
Factories, Dated: January 29,
1982
- 11) University Of California Of-
fice Of The Vice President -
Agriculture & University
Services, Project No. USDA-
SEAAR Fruit Production
Research, Project Title: Em-
bryo Culture Of Early-Matur-
ing Hybrids For The De-
velopment Of Improved Early-
Maturing Peach, Nectarine and
Plum Varieties, Dated: Janu-
ary 13, 1982
- 12) University Of California Office
Of The Vice President -
Agriculture & University Ser-
vices, Project No. Pending,
Project Title: The Japanese
Market for Plums and Nec-

tarines, Dated: February 24,
1982

- 13) University Of California Office
Of The Vice President - Agri-
culture & University Services,
Project No. H-3947, Project
Title: Stone Fruit Pest Man-
agement: Timing Post-Bloom
Treatments For Oriental Fruit
Moth, Peach Twig Borer and
San Jose Scale Using Predictive
Phenology Models, Dated:
January 29, 1982
- 14) USDA Market Quality & Tran-
sportation Research Laboratory
- Work Unit: 5202-20580-004,
- Project Leader: Dr. Douglas J.
Phillips, Project Title: In-
fluence Of Orchard & Packing-
house Practices On Surface
Damage Of Stone Fruits
- 15) USDA Market Quality &
Transportation Research La-
boratory - Work Unit Project
Leader: Project Title: De-
velopment Of Non-Phytotoxic
Quarantine Treatments For
Nectarines, Peaches and Plums
- 16) Memorandum - From: G.P.
Muck, To: William Doyle,
Subject: 1982-1983 Stone Fruit
Budgets, Dated: May 24, 1982

- 17) Memorandum - From: G.P. Muck, To: William Doyle, Subject: Joint Meeting, Stone Fruit Committee - Promotion & Research, Dated: May 26, 1982 -
- 18) Memorandum - From: G.P. Muck, To: William Doyle, Subject: Pear Committee Budget, Dated: July 6, 1982
- 19) Memorandum - From: William Doyle, To: Director, Fruit & Vegetable Division, Subject: Approval Of Increase Of Expenditures For Market Development & Research 1982-1983 Season, Dated: March 23, 1983
- 20) Memorandum - From: Fruit Branch, To: Director, Fruit & Vegetable Division, Subject: Approval Of Market Development & Research 1982-1983 Season

(EE): Folder Consisting Of:

- 1) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: CE-7-81-A, Project Title: The Japanese Market For Plums & Nectarine (Extended), Dated: January 15, 1983
- 2) University Of California Office Of The Vice President - Agriculture & University Services,

Project No.: H-3947, Project Title: Stone Fruit Pest Management: Bionomics of Omnivorous Leafroller and San Jose Scale, Dated: January 31, 1983

- 3) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: USDA-ARS Fruit Generics & Breeding Research Unit, Project Title: Embryo Culture Of Early-Maturing Hybrids For The Development Of Improved Early-Maturing Peach, Nectarine and Plum Varieties, Dated: January 31, 1983
- 4) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: 3255-H, Project Title: Pre and Post-Harvest Decay Of Fresh Market Peaches, Plums and Nectarines, Dated: December 22, 1982
- 5) University Of California Office Of The Vice President - Agriculture & University Services, Project No. 3952-H, Project Title: Modified Atmospheres During Preparation, Transport, and Storage Of Stone Fruits, Dated: January 31, 1983

- 6) University Of California Office Of The Vice President - Agriculture & University Services, Project No. CA-D*XXX-3346-H, Project Title: On Constructing Inherently More Efficient Peach and Nectarine Factories, Dated: January 31, 1983
- 7) University Of California Office Of The Vice President - Agriculture & University Services, Project No.: POM-4142-H, Project Title: The Improvement Of Fruit Size and Quality Through Cultural Practices, Dated: January 31, 1983
- 8) Notice To Subcommittee For Promotion and Research - Stone Fruits of Meeting On April 6, 1983, From Galen Geller, Dated: March 16, 1983
- 9) USDA Memorandum - From: William J. Doyle, To: Director, Fruit and Vegetable Division, Subject: Approval Of Market Development & Research, 1983-1984 Season, Dated: August 2, 1983
- 10) USDA - Horticultural Crops Research Laboratory, Work Unit/ Project No. 5202-20660-003, Project Leader: Dr. John M. Harvey, Project Title: Develop-

- ment of Non-Phytotoxic Quarantine Treatments For Nectarines, Peaches and Plums, Dated: January 14, 1983
- 11) UC Davis Memorandum - From J.M Ogawa, To: F.G. Mitchell, Subject: Proposal For The California Tree Fruit Agreement, Dated: December 22, 1982
 - 12) Cooperative Extension University Of California Memorandum - From: F. Gordon Mitchell, To: CTFA Research Subcommittee, Subject: Research Proposal Submission - Postharvest Studies, Dated: January 26, 1983
 - 13) 1983-1984 Ripening Bowl Income Statement
- (FF): USDA Memorandum - From: Fruit Branch, To: Director, Fruit and Vegetable Division, Subject: Increase in Market Development Budget For Plums, Dated: April 5, 1985
- (GG): Folder Consisting Of:
- 1) USDA Memorandum - From: Acting Chief, Marketing Order Administration Branch, To: Director, Fruit and Vegetable Division, Subject: Approval Of Market Development and Research, 1985-1986 Season

2) USDA Memorandum -
From: W.B. Blackburn, To:
William J. Doyle, Subject:
CTFA Research Meeting,
Dated: February 19, 1985

3) Research Projects - Pears,
1985 Season

(HH): Memorandum - From Deputy
Director Thomas R. Clark, To:
David B. Fitz, Subject: Approval
Of Research & Market Develop-
ment Projects for California
Nectarines, Peaches, Pears and
Plums, Dated: August 27, 1986

(II): Folder Consisting Of:

1) USDA Memorandum - From:
Acting Director, Charles R.
Brader, To: David B. Fitz,
Subject: Approval Of Re-
search, Market Development,
and Promotion Projects For
California Nectarines, Pea-
ches, Pears and Plums, Dated:
June 10, 1987

2) University of California, Div-
ision of Agriculture Science,
Project Plan/ Research Grant
Pro-posal, Project Title: Con-
trol Of Codling Moth By Mat-
ing Disruption, Dated: August
15, 1987

3) Africanized Honey Bee Man-
agement, A Research ~~Pro~~-
posal, 1987-1992

4) Pear Zone Research Proposal,
Use Of Dimilan To Control
Codling Moth

5) California Pear Zone, Re-
search Proposal 1987

6) University of California, Div-
ision Of Agricultural Science,
Project Plan/ Research Grant
Proposal, Project Title: IMP
In Pear Orchards: Optimizing
Chemical Management

7) University of California, Div-
ision Of Agricultural Science,
Project Plan/ Research Grant
Proposal, Project Title: Effect
Of Fungicides and Chemicals
on Pear Fruit Russett

8) USDA Memorandum - From
Acting Deputy Director, Wil-
liam J. Doyle, To: David B.
Fitz, Subject: Approval of Re-
search, Market Development
and Project For California
Pears, Dated: August 28, 1987

(JJ): Folder Consisting Of:

- 1) California Summer Fruits, Description Of Network Schedule, Summer 1988
- 2) California Summer Fruits, Summary Of Proposed Promotional Programs, 1988-1989
- 3) 1988 Media Tour Tentative Invitation List, 12 guests
- 4) Memorandum - From: Robert C. Keeney, Deputy Director, To: William J. Doyle, Subject: Approval of 1988-1989 Fiscal Year Research, Market Development, and Promotion Project for California Nectarines, Peaches and Plums, Dated: August 8, 1988
- 5) Letter dated December 30, 1988, From Kurt J. Kimmel, To: Jon Field

(KK): Folder Consisting Of:

- 1) USDA Memorandum - From: Ronald L. Cioffi, To: William J. Doyle, Subject: Approval Of Research and Marketing Projects For California Nectarines, Plums and Peaches, Dated: August 2, 1989
- 2) USDA Memorandum - From: William J. Doyle, To: Gary Olson, Subject: Approval of 1989-

1990 Fiscal Year Marketing and Research Projects for California Nectarines, Plums and Peaches, Dated: August 3, 1989

- EXHIBIT 298: Early to Mid-Season CTFA 1989 Free Standing Advertising Insert
- EXHIBIT 299: Deciduous Fruit Market Report, AMS (September 5, 1989)
- EXHIBIT 300: Tree Fruit Size Rings
- EXHIBIT 301: Television Advertisements Aired During the 1989 Harvest Season By CTFA
- (A): Page 8 of Exhibit 301
- (B): Page 9 of Exhibit 301
- (C): Page 10 of Exhibit 301
- (D): Page 11 of Exhibit 301
- EXHIBIT 302: Radio Advertisements Aired by CTFA During The 1988 and 1989 Harvest Seasons
- EXHIBIT 303: Radio Advertisements Aired by CTFA During The 1986 and 1987 Harvest Seasons
- EXHIBIT 304: Memo From Jon Field Re: Meeting With Karen Tully - March 21, 1989
- EXHIBIT 305: Memo From Jon Field Re: Phone Conversation With Karen Tully - April 28, 1989
- EXHIBIT 306: Memo From Karen Tully To Gregory Cooper, [In For Limited

Purpose Only - Not For Truth of Matter Contained Therein]

EXHIBIT 307: Maturity Variance Requests Submitted By Handler During The 1988 Harvest season [Nectarines]

- (A): Maturity Change Requested By David Sarabian Of Sarabian Farms, Dated: May 24, 1988
- (B): Nectarines Maturity Change Request Case Summary By Bob Pascoe Of Christen Solverson, Dated: June 10, 1988
- (C): Nectarines Maturity Changes Requested By Eugene Enns of Enns Packing, Dated: June 10, 1988
- (D): Nectarine Maturity Changes Requested By Keith Olsen Of Paul Kazarian, Dated: June 18, 1988
- (E): Nectarine Maturity Changes Requested By Jean Stutz Of Kaprielia Bros. Packing, Dated: June 24, 1988
- (F): Nectarine Maturity Changes Requested By Metae Flora Of Sarabian & Sons, Dated: June 27, 1988
- (G): Nectarine Maturity Changes Requested By Mark Peter-

son, Of Grinnin Boys, Dated: June 27, 1988

- (H): Nectarine Maturity Changes Requested By Vern Peterson, Dated: June 27, 1988
- (I): Nectarine Maturity Changes Requested By John Kaprielian, Of Kaprielian Bros. Packing Co., Dated: June 29, 1988
- (J): Nectarine Maturity Changes Requested By Robert Garcia, Of Garcia Family, Inc., Dated: June 30, 1988
- (K): Nectarine Maturity Changes Requested By Gary Elrich, Dated: July 7, 1988
- (L): Nectarine Maturity Changes Requested By Vince Balasian, Of Fruit Patch, Inc., Dated: July 27, 1988

EXHIBIT 308: Maturity Variances Requests Submitted By Handlers During the 1988 Harvest Season (Plums)

- (A): Plums Maturity Change Requested By Mr. Nelson, Of Superior Farming, Dated: July 13, 1988
- (B): Plums Maturity Change Requested By Warren Tufts, Dated: July 21, 1988

- (C): Plums Maturity Change Requested By Larry Barsamian, Of Kaprielian Bros., Dated: July 28, 1988
- (D): Plums Maturity Change Requested By Ron Nichols, Of Royal Valley, Dated: July 29, 1988
- (E): Plums Maturity Change Requested By Marvin Warkentin, Of WMJ Farm, Dated: August 27, 1988
- (F): Plums Maturity Change Requested By Mike Harriagn, Of Barr Packing, Dated: July 7, 1988

EXHIBIT 309: Peach Maturity Change Request By Ray Goosen, Of Ray Goosen and Son, Dated: August 17, 1988

EXHIBIT 310: Maturity Variance Request (Peaches)

- (A): Maturity Subcommittee - (1988 - Nectarines)
- (B): Maturity Subcommittee Minutes - 1988 (Plums)
- (C): Maturity Subcommittee Minutes - 1988 (Peaches)

EXHIBIT 311: Maturity Variance Requests (Nectarines)

- (A): Minutes - Nectarine Maturity Subcommittee of May 19,

1989 and Maturity Change Request By SPI-Reedley, Dated: May 19, 1989

- (B): Maturity Change Request By Pete Barsamian and Mike Mikaelian of Dinuba, Dated: May 19, 1989
- (C): Maturity Change Request By Dennis Prindeville, Dated: June 7, 1989
- (D): Maturity Change Request By Robert Garcia of Garcia Family, Inc., Dated: June 26, 1989
- (E): Maturity Change Request By John Kaprielian and Vernon Peterson of Kaprielian Bros. Packing Co., Dated: June 27, 1989
- (F): Maturity Change Request By Cliff Sadoian of Sadoian Bros., Dated: June 30, 1989
- (G): Maturity Change Request By Gary Elrich of Elrich Farms, Dated: July 7, 1989
- (H): Maturity Change Request By Craig Rasmussen of Balentine Packing Co., Dated: July 24, 1989
- (I): Maturity Change Request By Joe Garcia of Suma Fruit, Dated: August 11, 1989

- (J): Maturity Change Request By Rodney Chang, Of Kash, Inc., Dated: August 11, 1989
 - (K): Maturity Change Request By Bob Wilcoxon of Nash DeCamp, Dated: August 16, 1989
- EXHIBIT 312: (A): Minutes, Nectarine Maturity Subcommittee Meeting
- (B): Minutes, Plums Maturity Subcommittee Meeting, 1989
- (C): Minutes, Peaches Maturity Subcommittee Meeting, 1989
- EXHIBIT 313: List of Named Individuals On The Maturity Subcommittees For Peaches, Plums, and Nectarines 1988 and 1989 Harvest Seasons
- EXHIBIT 314: List of Named Individuals On The Peaches, Plums, and Nectarines Commodity Committee For 1988 and 1989 Harvest Seasons
- (A): List of Named Individuals On the Nectarine Administrative Committee—To Include Alternates, 1988 Harvest Season
 - (B): List of Named Individuals On the Plum Commodity Committee—To Include Alternates, 1988 Harvest Season

- (C): List of Named Individuals On the Peach Commodity Committee—To Include Alternates, 1988 Harvest Season
 - (D): List of Named Individuals On the Nectarine Administrative Committee—To Include Alternates, 1989 Harvest Season
 - (E): List of Named Individuals On the Plum Commodity Committee—To Include Alternates, 1989 Harvest Season
 - (F): List of Named Individuals On the Peach Commodity Committee—To Include Alternates, 1989 Harvest Season
- EXHIBIT 315: Bound Volume Setting Forth Documents With Respect To "Red Tags" Issued By Shipping Point Inspection For Alleged Failure To Comply With CTFA Maturity Requirements.
- EXHIBIT 316: Kash, Inc. Stickers - Alshir Red Plums
- EXHIBIT 317: Kash, Inc. Stickers - Sweetheart Plums
- EXHIBIT 318: Kash, Inc. Stickers - "Kash, Inc."
- EXHIBIT 319: Photograph, Depicting Kash, Inc. Promotional Display in Singapore

- EXHIBIT 320: Photograph, Depicting A Container Of Nectarines Packed and Sold Under Kash, Inc.'s Chillian Label
- EXHIBIT 321: Poster, "Sweetheart Plums" Advertisement Produced by Kash, Inc.
- EXHIBIT 322: Deciduous Fruit Market Reports, AMS (August 3, 1989)
- EXHIBIT 323: Deciduous Fruit Market Reports, AMS (September 7, 1988)
- EXHIBIT 324: Deciduous Fruit Market Reports, AMS (July 7, 1989)
- EXHIBIT 325: Deciduous Fruit Market Reports, AMS (September 6, 1989)
- EXHIBIT 326: 1989 Produce Availability & Merchandising Guide, *The Packers*, Pages A17-18, B197-201, B262-266, and B385-389
- EXHIBIT 327: Advertisement in *Packer* Produce Availability & Merchandising Guide, *The Packer*
- EXHIBIT 328: CTFA Assessment Billing Invoice Mailed To Kash, Inc. By CTFA For Monies Assessed During The 1989 Harvest Season For Peaches, Plums and Nectarines
- EXHIBIT 329: Maturity Variance Notice, Re: Flamekist (August 18, 1989)

- EXHIBIT 330: Minutes, Annual Meeting Of The Members Of The Tree Fruit Reserve (May 6, 1981)
- EXHIBIT 331: Minutes, Joint Meeting Of The Promotion & Research Subcommittees For The Peach, Plum, and Nectarine Commodity Committee (May 6, 1981) [Also included as part of USDA's Exhibit 297(W)].
- (*) EXHIBIT 332 R/S: Report Of Meeting of Shipping Point Inspection and CTFA Regarding Color Chips and Maturity Review (September 20, 1988)
- (*) EXHIBIT 333 R/S: Report Of Meeting of Shipping Point Inspection and CTFA Regarding Color Chips and Maturity Review (November 1, 1989)
- EXHIBIT 334: California Tree Fruit Agreement Violation Report Regarding Serimian Incident Referred To In Exhibits 228 and 228(A) through (D)
- EXHIBIT 335: California Tree Fruit Agreement Bulletin #1 (Nectarines), 1989
- EXHIBIT 336: California Tree Fruit Agreement Bulletin #1 (Peaches), 1989
- EXHIBIT 337: California Tree Fruit Agreement Bulletin #1 (Plums), 1989
- EXHIBIT 338: California Tree Fruit Agreement Bulletin #1 (Nectarines), 1988

- EXHIBIT 339: California Tree Fruit Agreement Bulletin #1 (Peaches), 1988
- EXHIBIT 340: California Tree Fruit Agreement Bulletin #1 (Plums), 1988
- EXHIBIT 341: Wileman Bros, & Elliott, Inc., Advertising Brochure
- EXHIBIT 342: Application For Membership-Tree Fruit Reserve, Signed By Frank T. Elliott, Jr., Dated: May 15, 1957
- EXHIBIT 343: Release and Transfer Of Funds To the Tree Fruit Reserve, Signed By Bernard Wileman. Dated: May 6, 1959
- EXHIBIT 344: Release and Transfer Of Funds To the Tree Fruit Reserve, Signed By Bernard Wileman. Dated: May 13, 1958
- EXHIBIT 345: Release and Transfer Of Funds To the Tree Fruit Reserve, Signed By Bernard Wileman. Dated: March 31, 1960
- EXHIBIT 346: Letter From CTFA Enclosing Check Returning Excess Assessments, Dated: June 2, 1951. Also, Enclosed Letter From Wileman Bros., & Elliott, Inc. Requesting Refund, Dated: May 21, 1951.
- EXHIBIT 347: Letter from Wileman Bros. and Elliott, Inc. and Kash, Inc. To The Tree Fruit Industry, Dated: May 23, 1989.

- EXHIBIT 348: Market Development Budget, 1989
- EXHIBIT 349: Pie Chart-Re: Spot Market & National Radio & Television, 1989
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- EXHIBIT 354: Daily Field Report Of Gary Van Sickle, Dated: January 24, 1989
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- (*) EXHIBIT 362 R/S: Two Bids, Re: Automobile Purchased By Gary Van Sickel, March 1988
- (*) EXHIBIT 363 R/S: Packout Report, 1988 (Peaches)
- EXHIBIT 364: Packout Report, 1988 (Nectarines)
- EXHIBIT 365: Packout Report, 1988 (Plums)
- EXHIBIT 366: Packout Report, 1989 (Peaches)
- EXHIBIT 367: Packout Report, 1989 (Plums)
- (*) EXHIBIT 368 R/S: Packout Report, 1989 (Nectarines)
- (*) EXHIBIT 369: Memo To David Lewis From Charles Brader Re: Results Of Investigation Conducted Pursuant To Karen Tully's "Whistle-blowing" Statement. Dated: January 28, 1990
- EXHIBIT 370: Photo- Sunny Slope Fruit Display In Corrogated Boxes
- EXHIBIT 371: Daily Report - Al Black, March 16, 1988
- EXHIBIT 372: Daily Report - Al Black, August 11, 1988
- EXHIBIT 373: Daily Report - Al Black, August 9, 1989

- EXHIBIT 374: Daily Report - Al Black, September 22, 1989
- EXHIBIT 375: Daily Report - Al Black, October 4, 1989
- EXHIBIT 376: Publication List Of F. Gordon Mitchell Through July, 1988.
- EXHIBIT 377: Supplemental Publication List Of F. Gordon Mitchell For 1989
- EXHIBIT 378: L.A.B. Scale Produced By F. Gordon Mitchell
- EXHIBIT 379: Bids On Automobile Purchased By Tree Fruit Reserve For Use By Dale Janzen (CTFA Field Agent)
- EXHIBIT 380: California Tree Fruit Agreement Folder For Schools and Food Editors (Nectarines)
- EXHIBIT 381: California Tree Fruit Agreement Folder For Schools and Food Editors (Plums)
- EXHIBIT 382: California Tree Fruit Agreement Folder For Schools and Food Editors (Peaches)
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- EXHIBIT 385: Benefits Brochure Relating To California Tree Fruit Agreement Employees, November 1989
- EXHIBIT 386: Check, For Purchase By Tree Fruit Reserve From California Tree Fruit Of The Ripening Bowl, September 8, 1988
- EXHIBIT 387: November 1989, Sacramento Leasing Guide
- EXHIBIT 388: Sacramento Map Attached To Sacramento Leasing Guide
- (*) EXHIBIT
389 R/S: Minutes - Grower Nominations, December 15, 1989 (Not Admitted For the Truth Of The Matters Stated Therein)
- EXHIBIT 390: Letter To Jon Field From Kurt Kimmel Re: Nomination Meeting, December 21, 1988; Letter to Kurt Kimmel From Jon Field Re: Nomination Meeting, December 19, 1988 (Not Admitted For The Truth Of The Matter Stated Therein)
- EXHIBIT 391: Wileman Bros. and Elliott, Inc. and Kash, Inc. - Campaign Card
- (*) EXHIBIT
392 R/S: California Tree Fruit Agreement - Shipper Questionnaire Filled Out By Members Of Control Committee

- (*) EXHIBIT
393 R/S: California Tree Fruit Agreement-Shipper Questionnaire Filled Out By Members Of Control Committee
- (*) EXHIBIT
394 R/S: California Tree Fruit Agreement-Questionnaire Filled Out By Growers Members Of Plum Committee
- (*) EXHIBIT
395 R/S: California Tree Fruit Agreement-Questionnaire Filled Out By Growers Members Of Nectarine Committee
- (*) EXHIBIT
396 R/S: Document Signed By Committee Members Upon Acceptance of Position On Commodity Committee
- EXHIBIT 397: Reserved For A Copy Of Contract Between California Tree Fruit Agreement and Its Advertising Agency (Respondent To File Within 5 Working Days - If Not Filed Within 5 Days, Exhibit To Be Vacated) Documents not filed & per Transcript, no such document existed
- EXHIBIT 398: Subpoena Duces Tecum Issued To Jon Field, With Respect To Wileman Bros. & Elliott, Inc. and

Kash, Inc. (AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2)

EXHIBIT 399: Minutes - Management Services, Dated: May 6, 1986 (Provided Pursuant To Freedom Of Information Act Request Issued With Respect to AMA Docket Nos. F&V 916-1, 917-3, 916-2, 917-2)

EXHIBIT 400: The List of Those Matters From The Wileman 1 Transcripts and Proceedings (Including Transcripts, Exhibits, Pleadings, Decisions, Etc.) Which Have Been Incorporated Into This Wileman 2 Proceeding

(*) By Transmittal of May 2, 1990, Respondent submitted to the Hearing Clerk new copies of said exhibit because the reproduced copies which it had bore extraneous comments which were not part of the document offered and received into evidence.

ADMINISTRATIVE PROCEEDINGS WITHIN
THE UNITED STATES DEPARTMENT OF
AGRICULTURE BEFORE THE SECRETARY
OF AGRICULTURE

AMA DOCKET NOS. F&V 916-3, 917-3

IN RE: WILEMAN BROS. & ELLIOTT, INC.,
A CALIFORNIA CORPORATION, AND KASH, INC.,
A CALIFORNIA CORPORATION, PETITIONERS

v.

RICHARD LYNG, SECRETARY OF AGRICULTURE,
RESPONDENT

[Rec. June 6, 1988]

PETITION TO MODIFY VARIOUS PROVISIONS
OF THE NECTARINE, PLUM AND PEACH
MARKETING ORDERS;

AND/OR

PETITION TO TERMINATE VARIOUS
PROVISIONS OF THE NECTARINE, PLUM AND
PEACH MARKETING ORDERS;

AND/OR

PETITION TO EXEMPT PETITIONERS FROM
VARIOUS PROVISIONS OF THE NECTARINE,
PLUM AND PEACH MARKETING ORDERS AND
ANY OBLIGATIONS IMPOSED IN CONNECTION
THEREWITH THAT ARE NOT IN
ACCORDANCE WITH LAW

[7 U.S.C. §608c(15)(A); 7 C.F.R. §§916.1, et seq.
and 917.1, et seq.]

I

DESCRIPTION OF PETITIONERSA. WILEMAN BROS. & ELLIOTT, INC.

Pursuant to 7 C.F.R. §900.52(b)(1), Petitioner WILEMAN BROS. & ELLIOTT, INC. (hereinafter "Petitioner Elliott"), states the following:

(a) Petitioner's correct name is WILEMAN BROS. & ELLIOTT, INC.

(b) Petitioner's mailing address is P. O. Box 309, Cutler, California, 93647.

(c) Petitioner's principal place of business is located at 40232 Road 128, Cutler, California.

(d) Petitioner is a corporation, incorporated in the State of California on the date of May 10, 1948.

(e) The names of the officers of Petitioner Wileman Bros. & Elliott, Inc., are as follows:

President: Frank T. Elliott, Jr.

Secretary: Frank T. Elliott, III

Treasurer: Gregg Evangelho

The addresses of all officers are the same as (c) immediately above.

B. KASH, INC.

Pursuant to 7 C.F.R. §900.52(b)(1), Petitioner KASH, INC. (hereinafter "Petitioner Kash"), states the following:

(a) Petitioner's correct name is KASH, INC.

(b) Petitioner's mailing address is P. O. Box 310, Parlier, California, 93648.

(c) Petitioner's principal place of business is located in Parlier, California.

(d) Petitioner is a corporation, incorporated in the State of California on the date of May 28, 1968.

(e) The names of the officers of Petitioner Kash, Inc., are as follows:

President: Rodney Chang

Vice President: Edward Ogawa

Secretary: Carol Ogawa

Chairman of
the Board: John Kashiki

The addresses of all officers are the same as (b) immediately above.

II

PETITIONERS' GENERAL CONTENTIONS RE WHY VARIOUS PROVISIONS OF THE NECTARINE, PLUM AND PEACH MARKETING ORDERS, OR THE INTERPRETATION OR APPLICATION THEREOF,

AS WRITTEN, AND/OR AS APPLIED ARE NOT IN
ACCORDANCE WITH LAW

1. This Petition is made with respect to the Marketing Orders for Nectarine. Plums and Peaches grown in California, 7 C.F.R. §§ 916.1, et seq., and 917.1, et seq., inclusive (hereinafter referred to as the "Nectarine Order", "Plum Order", and "Peach Order"), pursuant to the Agricultural Marketing

Agreement Act of 1937 (hereinafter the "Act"), Title 7, U.S.C. §601, et seq.

2. Petitioners claims that various provisions of the Nectarine, Plum and Peach Orders, in their language and/or in their application, and/or in their obligations imposed in connection therewith, are void and not in accordance with law.

3. Petitioners also claim that the below-described provisions of the Nectarine, Plum and Peach Orders, in their language and/or in their application, and/or in their obligations imposed in connection therewith, are a violation of the First Amendment of the United States Constitution and the due process of the Fifth Amendment of the United States Constitution.

4. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders are void as being an improper delegation of authority from the Secretary of Agriculture to the Nectarine, Plum, and Peach Committees, the Control Committee of the California Tree Fruit Agreement, and the Nectarine, Plum and Peach Maturity Subcommittees, and their respective appeal committees.

5. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders, as interpreted and as applied, are void as there has been no properly delegated authority to either the Nectarine, Plum and Peach Committees, the Nectarine, Plum and Peach Maturity Subcommittees, the California Tree Fruit Agreement, and the Appeals Committee.

6. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders are void since the Administrative Procedures

Act was not followed with respect to implementing the "laws" stated below.

7. Petitioners also claim that the various below-mentioned provisions of the Nectarine, Plum and Peach Orders, and the regulations executed thereafter, are void and not in conformity with the law with respect to assessments assessed against the Petitioners with respect to peaches, plums and nectarines.

8. Petitioners also contend that the below-described provisions of the Nectarine, Plum and Peach Marketing Orders, and the rules and regulations executed thereafter as written, and/or in their application, and/or in their obligation imposed in connection therewith, are a violation of procedural and substantive due process since, in the application of "regulations" which were not promulgated pursuant to law, or in those rules which, although promulgated pursuant to law but applied not in accordance with the law, amount to a complete taking of nectarine, plums and peaches, without just compensation and without furthering any proper Governmental purpose, and without providing a pre-deprivation hearing in accordance with law.

9. Petitioners also contend that the said delegation of authority to committees, made up of competitors of the Petitioners, are contrary to the intent and policy of Congress in enacting the Act, and contrary to the Supreme Court's rulings in *Panama Refining Company v. Amazon Petroleum Corporation*, 293 U.S. 388, 55 S.Ct. 241 (1935); *Wichita Railroad and Light Company v. Public Utilities Commission*, 260 U.S. 48, 59, 43 S.Ct. 41, 55; *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935); *Carter v. Carter Coal Company*, 298 U.S.

238, 56 S.Ct. 855 (1936); *Industrial Union v. American Petroleum*, 448 U.S. 607, 100 S.Ct. 2844 (1980); and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478 (1981).

10. Petitioners also contend that the Nectarine, Plum and Peach order assessments for the 1988 season are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the Administrative Procedures Act.

11. Petitioners also contend that the Nectarine, Plum and Peach Order assessments for 1980 through 1988 are invalid, and unconstitutional because at least fifty percent of the assessments compelled to be paid by the Petitioners are violative of the First Amendment to the United States Constitution because it was compulsory subsidization of ideological, economical and commercial activity engaged in by the Nectarine, Plum, and Peach Committees to which Petitioners object, as more completely stated below, and in contravention of the holdings in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), and *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 106 S.Ct. 1066 (1986), and cases cited therein.

12. The interim final rules issued by the Secretary, and dated May 24, 1988, regarding the new maturity regulations for nectarine, plums and peaches, were invalid because the Administrative Procedures Act was not followed, and thus are void.

13. The interim final rules issued by the Secretary and dated May 24, 1988, with respect to the new maturity regulations for nectarines, plums and peaches, are violative of the Administrative Procedures Act because they did not sufficiently address comments

submitted, they are arbitrary and capricious, they were not premised on a substantial basis, and alternatives were not considered.

14. The budget and assessments for the Nectarine, Plum and Peach Marketing Orders for the 1988 season are violative of the Administrative Procedures Act since there is no substantial basis and purpose for said assessments and budget, the Secretary failed to review the alternatives and there is "no good cause" exception pursuant to Title 5, U.S.C. §553, for non-compliance with the notice-and-comment procedures in promulgating the budget and the assessments for the 1988 season.

15. The Secretary has violated the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", by refusing to follow its own rule in §900.70 of Title 7, C.F.R., by continuously determining that interim relief is unavailable with respect to any administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A).

16. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid because they do not afford any retrospective relief or any monetary damages as a result of being financially injured as a result of an invalid, Nectarine, Plum or Peach Marketing Order provision or its application.

17. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid because they do not afford any timely or effective relief and

"thus are a violation of the due process clause of the United States Constitution.

III

STATEMENT OF FACTS RE PETITIONERS AND THEIR CONTENTIONS

18. Petitioner Wileman Bros. & Elliott, Inc. (hereinafter referred to as "Petitioner Elliott"), and Kash, Inc (hereinafter referred to as "Petitioner Kash") are both growers and handlers of plums and nectarines. Petitioners handle their own varieties of plums and nectarines as well as handle outside growers' varieties of plums and nectarines.

19. Petitioner Kash, Inc., is both a grower and handler of peaches.

20. Petitioner Elliott is the only grower and handle of Tom Grand nectarines. Petitioner Elliott is one of two growers of Ebony plums and one of two handlers of Ebony plums, and grows and handles a significantly greater volume of Ebony plums than the one other grower of Ebony plums.

21. Petitioners market a much greater percentage of their nectarines and plums (and with respect to Kash, Inc., its peaches as well) in the East Coast terminal markets. The fruit being shipped to the East Coast markets takes a considerably greater period of time to reach the store shelves through the terminal markets there than it does reaching the store shelves in national chainstores or in West Coast markets.

22. Nectarines, peaches and plums will continue to ripen after they become mature, and with respect to some varieties of nectarines and plums and peaches handled by the Petitioners, fruit required to be "well-

matured" at the time of picking and packing is over-mature for purposes of marketing said fruit in the East Coast terminal markets.

23. Petitioner Elliott, as a corporation, has been a handler of nectarines and plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of nectarines, plums and peaches, since 1968.

24. On or about May 4, 1988, the Nectarine Administrative Committee adopted an 18-cent per carton assessment against each container of nectarines packed by the Petitioners. Of that 18 cents, only approximately 5 cents was for inspection of those cartons of nectarines, and over 10 cents per container was assessed against each container for "market development", which included field staff activities, retail advertising incentives, trade communications, retail projects, point-of-sale materials, publicity, education activities, food service activities, TV and radio production, TV advertising, radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion, and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May, 1988, was approximately \$1,761,886.00. Petitioners object to being assessed for "market development", as described above, because said advertising and market development has not been shown to increase returns to the Petitioners, or their growers, Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioners sell their fruit, and it forces the Petitioners to subscribe to ideologies and economical philosophies with which they do not agree. From 1980 to the present, over half of the assess-

ments paid by Petitioners has been used for "market development" with which Petitioners do not agree

25. On or about May 4, 1988, the Plum Administrative committee adopted an 19-cent per carton assessment against each container of plums packed by the Petitioners. Of that 19 cents, only approximately 6 cents was for inspection of those cartons of plums, and approximately 10 cents per container was assessed against each container for "market development", which included field staff activities, retail advertising incentives, trade communications, retail projects, point-of-sales materials, publicity, education activities, food service activities, TV and radio production, TV advertising, radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion, and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,831,459.00. Petitioners object to being assessed market development, as described above, because said advertising and market development has not been shown to increase returns to the Petitioners, or their growers, Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumer to whom Petitioners sell their fruit, and it forces the Petitioners to subscribe to ideologies and economic philosophies with which they do not agree. From 1980 to the present, over half of the assessments paid by Petitioners has been used for "market development" with which Petitioners do not agree.

26. On or about May 4, 1988, the Peach Administrative Committee adopted an 18-cent per carton assessment against each container of peaches packed by

Petitioner Kash, Inc. Of that 1 cents, only approximately 6 cents was for inspection of those cartons of peaches, and approximately 9 cents per container was assessed against each container for "market development", which included field staff activities, retail advertising incentives, trade communications, retail projects, point-of-sales materials, publicity, education activities, food service activities, TV and radio production, TV advertising, radio advertising, outdoor advertising, Canadian promotion, promotion research, merchandising research, promotion expense, Hispanic promotion, and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,225,435.00. Petitioner Kash, Inc., objects to being assessed, market development, as described above, because said advertise: and market development has not been shown to increase returns Petitioner Kash, Inc., or its growers, Petitioner Kash, Inc., objects to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioner Kash, Inc., sells its fruit, and it forces Petitioner Kash, Inc., to subscribe to ideologies and economic philosophies with which it does not agree. From 1980 to the present, over half of the assessments paid by Petitioner Kash, Inc., has been used for "market development" with which Petitioner Kash, Inc., does not agree.

27. Furthermore, a portion of the assessments assessed against the Petitioners is being utilized by the Committees and the California Tree Fruit Agreement for research projects of which the Petitioners do not subscribe. Said research projects include hiring such individuals to write reports ostensibly

showing that small size fruit is not desired by consumers, to write reports showing that "well-matured" fruit is what is desired by consumers, and to pay individuals and firms for writing reports ostensibly showing that advertising is beneficial to the industry. Petitioners contend that this type of research activity is done for the purpose of supporting more restrictive picking, packing and marketing of peaches, plums and nectarines, is intended by the Committees and CTFA, through volume control, and under the guise of providing consumers with better quality fruit, to restrict the trade of and marketing by the Petitioners, in a form and manner with which the Petitioners do not agree. Petitioners contend that this is done by the Committees and CTFA to promote their own ideological and economic philosophies to which Petitioners do not subscribe.

28. Petitioners also contend that a small portion of their assessments are being used to finance the California Tree Fruit Agreement and their authority has never been published in the Federal Register for notice and comment and is an entity who has never been delegated authority pursuant to the Administrative Procedures Act and thus assessments used to support an entity which, by law, does not legally exist, are null and void.

29. Petitioners also contend that approximately 5-to-6 cents per container is being assessed against the Petitioners to provide for inspection service to inspect the cartons utilizing tests and standards that have never been lawfully promulgated, said tests and standards being utilized by the inspection service have caused the Petitioners substantial losses in picking, culling, and marketing their fruit.

30. Any monies advanced by Petitioners for promotion engaged in by the Petitioners are not credited toward the amount of the assessment assessed against the Petitioners for the Committee and CTFA promotional activities.

31. On April 8, 1988, the Secretary issued proposed rules with respect to plums which proposed to regulate out smaller-size plums, and to change maturity determinations, requests for variances, and to define "well-matured". (53 Federal Register, Pgs. 116669, et seq.)

32. On April 18, 1988, the Secretary issued proposed rules with respect to the eliminating smaller sizes of nectarines and peaches, and also changing the maturity determinations and variances to the maturity determinations, basically identical to the plum maturity changes. (53 Federal Register, Pgs. 12690, et seq. (nectarines); 53 Federal Register, Pgs. 12694, et seq. (peaches).)

33. With respect to the peach, plum and nectarine proposed rules, described in paragraphs 31 and 32 above, only a fifteen-day comment period was provided, and for plums, a seven-day extension was granted at the request of the Petitioners' counsel. These proposed rules with respect to peaches, plums and nectarines, occurred over four months after the respective Peach, Plum and Nectarine Committees met in December, 1987, and proposed to the Secretary the elimination of small sizes of peaches, plums and nectarines. The Peach, Plum and Nectarine Committees also voted to approve the same maturity standards and determinations for the 1988 season that were employed in the 1987 season. There was not good cause shown for providing less than a thirty-day

comment period with respect to each of the proposed rules issued, as described above.

34. Thereafter, on May 27, 1988, the Secretary's designee issued interim final rules, purportedly binding on the Petitioners, which substantially altered the maturity determinations, altered the procedure for changes to the maturity determinations, than what had been proposed in the proposed rule issued approximately five weeks earlier. In said interim final rules, the Secretary rejected the Committee proposal to eliminate small-size plums, but at the same time, the Secretary adopted the Nectarine Committee proposal to eliminate small-size nectarines, and said determination by the Secretary to eliminate small-size nectarines was arbitrary, capricious, not based on a substantial record, and wherein the Secretary refused and failed to address objecting comments. Furthermore, Petitioners contend that the Secretary relied on false information in issuing an interim final rule with respect to elimination of small-size nectarines, which the Secretary knew, or should have known, was false.

35. The Petitioners contend that the Secretary failed to comply with the Administrative Procedures Act notice and comment period, and there was no good cause show, for issuing an interim final rule, which substantially differed from the proposed rule issued by the Secretary approximately five weeks earlier, with respect to maturity determinations and maturity variances. The Secretary's proposed rule with respect to maturity for peaches, plums and nectarines, proposed that the Shipping Point Inspection Service actually set color standards or other maturity tests to determine the "well-matured" standard, and granted only to the SPI the right and

ability to vary or change those color chip standards or other maturity tests, which proposed to eliminate the Maturity Subcommittee of each of the respective Committees, which had existed from 1980 through the 1987 seasons. In said proposed rules, the Secretary published, for the first time, the actual "color standards" or other "maturity tests" which the Secretary claimed the Inspection Service established previously, which the Secretary knew, or should have known, was false, since the Secretary knew, or should have known, that in the past 8 years, it was the Maturity Subcommittees, made up of Petitioners' competitors, which actually set the "color standards" or other maturity tests, and changed the "color standards" or other maturity tests.

36. With respect to the interim final rules issued regarding peaches, plums and nectarines, there were additional false statements made in the interim final rule which the Secretary knew, or should have known, were false, or were conclusions drawn by the Secretary which were arbitrary, capricious, or not based upon substantial evidence—many of which are stated as follows:

(a) Comments to the proposed rule not only discussed, but showed, that the maturity regulations and the size recommendations were done by the Committees for volume control; the Secretary never addressed this comment;

(b) The Secretary, with respect to nectarines, found that consumers wanted larger-sized nectarines, but at the same time, found that the evidence was inconclusive with respect to consumers not desiring smaller-sized plums—despite the fact that the same studies cited by the Secretary with respect to plums were the same authorities cited with respect to nec-

tarines, and the studies do not distinguish between the two; and in fact, only four retailers out of twenty-five retailers interviewed wanted to see the smaller sizes eliminated, and twenty-one out of twenty-five of the retailers interviewed wanted both the smaller sizes and the larger sizes;

(c) The report (by Ervin D. Thuerk) cited by the Secretary was directed to twenty-five "key supermarket chain executives" which represented only 38.7% share of the total industry, and the Secretary failed to point out that the terminal markets were totally unrepresented in the study conducted, which is where many handlers, including the Petitioners, ship their fruit;

(d) The Secretary cites Mr. Thuerk's research that early-season fruit which is small in size does not provide satisfaction to the consumer and does not encourage repeat purchases, but fails to point out that only four out of the twenty-five large supermarket chains interviewed wanted to eliminate small sizes, while the vast majority wanted to keep them; thus the Secretary relied on certain statements made by Mr. Thuerk, and failed to address others that would contradict the conclusions wished to be drawn by the Secretary;

(e) The Secretary addressed the comments that it was too late for growers to modify their cultural practices in order to meet the more restrictive size requirements for nectarines and peaches, but the Secretary rejected this by stating that when the Committee made its recommendations the growers had already begun to undertake cultural practices to obtain "desirable fruit size"; but with respect to plums, the Secretary contradicted this statement by stating: "Finally, it is too late this season for

growers to make any cultural changes on the basis of the proposed size increases if they have not already done so"; and the Secretary fails to explain the difference in the two statements—one with respect to nectarines and peaches, and the other with respect to plums;

(f) In response to the comments that the size proposal would reduce the volume of fruit and was thus volume control, the Secretary stated that that was disputed because "small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger size fruit", and thus, the Secretary failed to address the issue of whether there would be a reduction of the amount of fruit to reach the market and was indeed volume control;

(g) Furthermore, the size regulations affect certain varieties of fruit, but was not directed at other varieties of fruit which is discriminatory, arbitrary and capricious, since if consumers reject small-size fruit, they would reject them with respect to all varieties, and not just some varieties; the Secretary made a false statement when he states that since May 16, 1980, nectarines, plums and peaches "have been required to be 'well-matured' rather than 'mature'", and further makes the false statement that "this requirement has been implemented by the Federal-State Inspection Service since that time"; since in truth and in fact, which was known by the Secretary, the regulations which went into effect on May 16, 1980, did not state that fruit was required to be "well-matured" but it was merely what the Committees decided thereafter to implement on their own without any rulemaking whatsoever; the Secre-

tary knew, or should have known, that the Federal-State Inspection Service did not set those standards in the past, but were set by the Committee of competitors made up of the Plum, Nectarine and Peach Committees and their respective Maturity Subcommittees, along with CTFA; the Secretary also invalidly states that since 1980 "the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of nectarines and which test level (e.g., particular color chip) is appropriate for each variety", and the Secretary knew, or should have known, that this statement was false since the Federal-State Inspection Service has merely occupied an advisory role with the respect to the Committees and their respective Maturity Subcommittees which actually set the standards, changing the standards at their whim and actually making "law" regardless of the concerns and opinions of the Federal-State Inspection Service;

(h) The Secretary also states that when the proposed rule was issued in April, 1988, the responsibility for issuing the maturity test, and granting variances during the seasons with respect to those maturity tests, was proposed to be given to the Federal-State Inspection Service to "lessen the burdens on Committee members", and Petitioners contend that the Secretary knew, or should have known, that this was a false statement in that the proposal to provide sole responsibility to the Federal-State Inspection Service, was a direct result of the Petitioners' previously filed and heard administrative petition proceeding which showed the unlawful delegation of authority by the Secretary to the Committees and the Maturity Subcommittees.

(i) The Secretary also invalidly stated that it was proposed to continue the "requirement that not less than ninety-percent of the fruit surface shall meet the color guide established for that variety, and not less than ninety-percent any lot shall meet the color guide established for that variety in that the Secretary knew, or should have known, that that was never a "requirement", but was a determination made by the respective Committees and the respective Maturity Subcommittee and the Secretary had never made that a "requirement" before; was also stated in the proposed rule with respect to maturity nectarines, plums and peaches, issued in April, 1988, that the Inspection Service had intended to use certain "color chips" and other maturity tests for nectarines, plums and peaches in the 1988 season, implying that the Inspection Service had actually set those "maturity tests" or other "color standards", when the Secretary knew, or should have known, that the Inspection Service has never set those standards, but have been set by the respective Committees and their respective Maturity Subcommittees—all made up of Petitioners' competitors;

(j) The Secretary, in adopting the "well-matured" standard, or re-adopting the "well-matured" standard, relies in part upon Mr. Thuerk's report which is attributed by the Secretary to state that the consumers do not want early-season fruit which is picked immature, but the Secretary fails to point out that such study states that consumers do not want "immature" fruit, which is a far cry from "well-matured", and is different than fruit being just "mature";

(k) The Secretary also vacuously states, in response to a comment that the "well-matured"

requirement has become more restrictive than it was when implemented in 1980, that only the number of color chips have increased but the "well-matured" standard has not become more restrictive, and the Secretary knew, or should have known, that his contention was false;

(l) In responding to a claim that the "well-matured" fruit has caused a large increase in harvesting costs, the Secretary merely responds that the commentor "did not document this claim", but the Secretary knew, or should have known, that said claim was documented through the transcripts of the hearing that occurred with respect to the administrative petition filed by the same Petitioners and heard in February and March of 1988, which information was before the Secretary at the time the interim final rule was issued;

(m) The Secretary also buttresses its claim that the "well-matured standard" has been well received by growers since at the last referendum, a majority of those voting favored continuance of the program, which ignores the fact that the referendum was not conducted with respect to eliminating the "well-matured" standard, but was conducted with respect to a continuation or termination of the entire Marketing Agreement, and there was no opportunity for line-item veto of any provision; in responding to a commentors objection to the "well-matured" standard that it is done for the purpose of volume control as indicated by the decrease in packages shipped per acre from 1980 through 1987, even though a higher number of trees were planted per acre, the Secretary stated that this evaluation was inconclusive because the commentor did not consider other factors in addition to the "well-matured" requirement such as age of the

trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements, and the Secretary knew, or should have known, that his contention was false and there was a complete failure by the Secretary to document his contention that there were less cartons per acre shipped since the "well-matured" standard came into existence based upon age of the trees, weather, cultural practices, and other handling requirements; the Secretary completely failed to comment about the fact that permitting the Committees, and the Maturity Subcommittees, to make the decisions as to which "color chips" or other "maturity tests" should be utilized for each variety of nectarine, plum and peach, was a violation of due process, and a violation of *Carter v. Carter Coal*;

(n) The Secretary failed to consider the comments with respect to the fact that the color standards or other maturity tests were not uniform, varied from variety to variety causing some fruit to have a shorter shelf life than other fruit, causing some fruit to be left on the trees a much longer time after the fruit otherwise met a U.S. No. 1, than other varieties of fruit, caused fruit that was shipped to the East Coast to arrive in an overripe condition, failed to adequately consider the drastically increased picking costs for having a "well-matured standard" in that said standard has required orchards to be picked five to seven times as opposed to two to three times, failed to address the comments that the said specific color chips or other maturity tests lacked any substantial basis and purpose, lacked any uniformity, lacked any studies and tests to determine the amount of fruit lost, or fruit wherein a decreased sales price was paid as a result of the overripe condition of the fruit, and

the Secretary has wholly failed to consider and comment upon the preliminary and tentative findings made by its own Administrative Law Judge, the Honorable Dorothea Baker, which preliminary findings were made following the conclusion of the administrative petition proceedings occurring in February and March of 1988 in Fresno, California, and the Secretary wholly failed to consider the testimony given under oath and the documents and exhibits presented at the administrative hearing with respect to the precise issues now being stated in the Secretary's interim final rules.

37. The Secretary's statement in the interim final rules (that it is "impracticable, unnecessary, and contrary to the public interest to give prior notice to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until thirty days after publication in the Federal Register", because shipments of the crop have begun and this action should cover as much of the 1988 crop as possible, the maturity requirements are substantially the same as currently implemented and should be made effective as soon as possible, and the interim final rule relaxes maturity requirements for a couple of various varieties) is false, and the Secretary knew, or should have known, that said statement is false since the new maturity requirement procedure and variance procedures are substantially different than what has occurred in the past, and substantially different than what was proposed in the proposed rule, and it is the Secretary's fault that the matter was not first published until April, 1988.

38. Petitioners contend that based upon the new size regulations for nectarines and peaches, and the new maturity procedures with respect to peaches,

plums and nectarines, the Petitioners will lose a substantial amount of fruit that would otherwise be of good consumer quality and of good marketable quality, in this season, and all subsequent seasons wherein the rules remain in effect.

IV

STATEMENT OF GROUNDS ON WHICH THE NECTARINE, PEACH AND PLUM REGULA- TIONS AND/OR THEIR INTERPRETATION AND/OR THEIR APPLICATION ARE NOT IN ACCORDANCE WITH LAW

39. Petitioners contend that permitting the Nectarine, Plum and Peach Committees, and their respective Maturity Subcommittees, to determine the color standards or other maturity tests, and to determine whether or not a change or variance should be made or not made, and also placing authority in the new Appeal Committees is an improper delegation of authority by the Secretary to the private industry, in violation of, among other cases, *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936); Petitioners also contend that the above-described maturity regulations, maturity-variance regulations, and the appeals regulations are a violation of the due process clause of the Fifth Amendment of the United States Constitution, under the authority of, among other cases, *Carter v. Carter Coal Co.*, *supra*.

40. Petitioners also contend that the above-described maturity regulations, maturity variance or change regulations, and the appeal regulations constitute a taking without just compensation in violation of the due process clause of the United States Constitution, since the standards have resulted, and will result in a taking without just compensation

under the new tests discussed in *Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S.Ct. 3141 (1987); *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552, 92 S.Ct. 1113 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862; and *Kirby Forest Industries v. United States*, 467 U.S. ___, 104 S.Ct. 2187, 2196 (1984). Petitioners also contend that the implementation of the new maturity standards, and the regulations eliminating smaller-sized nectarines and peaches, is a violation of the Administrative Procedures Act, because:

(1) There was an insufficient notice and comment period with respect to the interim final rules, and no good cause was shown for not providing additional comment period;

(2) There was no "emergency" existing which would permit the Secretary to only provide a fifteen day notice period instead of at least thirty days;

(3) There was no emergency existing, except a self-made emergency by the Secretary, in issuing an interim final rule, as opposed to another proposed rule;

(4) Since the interim final rule, with respect to maturity procedures, was drastically different than the proposed rule issued five weeks earlier, no interim final rule should have been issued before another proposed rule was issued, and the Secretary's reliance on the emergency exceptions to justify the interim final rule is without merit and without validity;

(5) There is no basis and purpose statement with respect to the new size elimination and maturity rules and regulations;

(6) The interim final rules wholly failed to address objecting comments, refused to consider

other alternatives, and relied on false and misleading information that the Secretary knew to be false and/or misleading.

41. The Petitioners also contend that the delegation of authority by the Secretary to Committees, made up of Petitioners' competitors, and the delegation of authority to the Maturity Subcommittees, and to the Appeals Committee, are contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement Act of 1937, and contrary to the Supreme Court holding in *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

42. Petitioners also contend that the Nectarine, Plum and Peach Order assessments for the 1988 season are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the administrative procedures act—all for the following reasons:

(a) The assessments used to fund the 1988 budget are primarily used to advance ideological principles of the Committees but opposed by the Petitioners in violation of the First Amendment of the United States Constitution, and contrary to the express holdings of *Aboud v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), *Chicago Teachers Union Local v. Hudson*, ___ U.S. ___, 106 S.Ct. 1066 (1986), *Galda v. Rutgers*, 777 F.2d 1060 (3rd Cir., 1985), and *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir., 1987);

(b) Since approximately fifty percent of the assessments assessed against the Petitioners are to be used by the Nectarine, Plum and Peach Committees, and the California Tree Fruit Agreement for advancing ideological and economical beliefs to which

the Petitioners do not subscribe and Petitioners are being taxed for the purpose of allowing their competitors to advance such beliefs which are opposed by the Petitioners, is in violation of the First Amendment of the United States Constitution;

(c) There is no substantial basis and purpose for the assessments and no substantial basis and purpose for the budget; and

(d) The Secretary failed to comply with the notice and comment provisions of the Administrative Procedures Act in issuing and setting the assessments and budget for the 1988 season.

43. The assessments assessed by the Secretary against the Petitioners from 1980 through 1987 suffer from the same First Amendment constitutional infirmities as the 1988 assessments with respect to taxing the Petitioners to promote philosophies, ideologies, and economic beliefs with which they do not agree.

44. Since the Petitioners have been previously involved in an administrative petition, the Petitioners contend that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted from Marketing Orders" do not provide the Petitioners with an adequate and timely relief with respect to assessments, because:

(a) There is no pool of money nor any source of funds available to reimburse the Petitioners for assessments if found to be invalid;

(b) By the time the matter is heard by the Administrative Law Judge, decided by the Administrative Law Judge, and then decided by the Judicial Officer, more assessments are assessed and collected from the Petitioners, or threatened to be collected from the Petitioners, and it has a chilling effect upon the Petitioners with respect to the Petitioners

subsidizing promotional work and research work with which they do not subscribe.

45. The Secretary has violated the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", with respect to maturity regulations and size regulations, because the Secretary has continuously determined that no interim relief is available with respect to any administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A), and a substantial amount of the Petitioners' fruit will have to be thrown out, not picked, or not marketed because of said maturity and size regulations, for which there is no fund of money in order to reimburse the Petitioners in the event they later prevail in the administrative proceedings and said rules are invalid because they do not afford any retrospective relief or any monetary damages as a result of being financially injured as a result of the invalid Nectarine, Plum or Peach Marketing Order provisions with respect to maturity and size "regulations".

46. Petitioners also contend that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any timely or effective relief and are thus in violation of the due process clause of the United States Constitution; Petitioners also contend that said maturity regulations and said size regulations are in fact volume control and the Secretary has failed to comply with the Agricultural Marketing Agreement Act by failing to apportion the surplus volume in an equitable and fair manner, and has discriminated against various varieties of nectarines, peaches and plums, several of

which are handled by the Petitioners, which amounts to a denial of equal protection of the laws.

V

PETITION FILED IN GOOD FAITH AND NOT FOR DELAY

47. This Petition is filed in good faith and not for the purposes of delay. Furthermore, Petitioners request an expedited hearing in this regard, and also seek interim relief.

PRAYER FOR RELIEF

48. For the reasons set forth above, Petitioners pray for the following specific relief:

A. For a ruling that §§917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables showing the specific "maturity tests" or other "color standards", of the Nectarine, Plum and Peach regulations issued in 1988, and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

B. For a ruling that the specific color standards and/or other maturity tests referenced in paragraph 48(A) above, as written and/or as applied are not in accordance with the law;

C. For a ruling that the various specific color standards and/or maturity tests as referenced in paragraph 48(A) above, as written and/or as applied, are a denial of equal protection of the laws;

D. For a ruling that the specific maturity tests and/or color standards referenced in paragraph 48(A) above, as written and/or as applied, result in a denial of due process of law since it amounts to a taking without due process and without just compensation;

E. For a ruling that the maturity tests and/or "color standards", and the procedure in determining said maturity tests and/or color standards, and the procedure to be utilized in requests for changes or variances to the maturity tests and the appeals, is a denial of due process of law since it constitutes an unlawful delegation of authority to Petitioners' competitors;

F. For a ruling that the specific maturity tests and/or "color standards" referenced in paragraph 48(A) above, as written and/or as applied, are arbitrary, capricious and not based on substantial evidence;

G. For a ruling that the specific maturity tests and/or "color standards" referenced in paragraph 48(A) above were enacted in violation of the Administrative Procedures Act and are thus null and void;

H. For a ruling that the specific new size regulations for nectarines and peaches, as issued as interim final rules by the Secretary in May of 1988, as written and/or as applied, were enacted in violation of the Administrative Procedures Act and are thus void, and/or are in actuality volume control and are contrary to the Agricultural Marketing Agreement Act;

I. For a ruling that the specific maturity tests or specific color standards referenced in paragraph 48(A) above, as written, and/or as applied are in effect volume control, and are violative of the Agricultural Marketing Agreement Act;

J. For a ruling that neither the Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Committee, the Control Committee of the California Tree Fruit Agreement,

the Maturity Subcommittees of any of the above-described Committees nor "Appeals Committee" are empowered, to set and determine, change, vary, deny changing, deny varying, or ruling on the appeal from the denial of specific color standards, or other maturity tests;

K. For a ruling that the assessments issued for 1988 are not in accordance with law, since they were not enacted in accordance with the Administrative Procedures Act;

L. For a ruling that the assessments issued for 1988 are not in accordance with law since they are violative of the Petitioners' First Amendment constitutional rights;

M. For a ruling that the assessments assessed and collected from the Petitioners from 1980 through 1986, and the assessments assessed against the Petitioners in 1987 are not in accordance with law since the majority of the assessments are being used to pay for promotion, other forms of research, and other items reflecting the ideological, economical, and philosophical viewpoints of Petitioners' competitors, to which Petitioners do not subscribe and thus are violative of the First Amendment of the United States Constitution;

N. For a ruling that the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any retrospective relief or any monetary damages for financial injuries as a result of an invalid Marketing Order or Marketing Agreement regulation;

O. For a ruling that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid

because they do not afford any timely or effective relief and thus are a violation of the due process clause of the United States Constitution;

P. For a ruling that the Secretary has failed to comply with the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" for refusing to grant any form of interim relief, despite the irreparable injury that would occur in the event interim relief is not granted, and thus the Secretary has failed to follow its own rules of procedure;

Q. For a ruling that Petitioners need not exhaust their administrative remedies pursuant to the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" and §608c(15)(A) of the Agricultural Marketing Agreement Act, since the Secretary has already determined that Petitioners' Petition would be futile to exhaust since he has already made up his mind that no violation stated herein will be found to have occurred, no remedy can be afforded, no retrospective relief can be granted, and no relief at all will be granted to the Petitioners;

R. For any other relief deemed necessary and just.

DATED: June 3, 1988.

THE LAW FIRM OF THOMAS E. CAMPAGNE
A Professional Corporation

By /s/ BRIAN C. LEIGHTON
BRIAN C. LEIGHTON

Attorney for Petitioners

[verification and certificate of service omitted in printing]

ADMINISTRATIVE PROCEEDINGS WITHIN
THE UNITED STATES DEPARTMENT OF
AGRICULTURE BEFORE THE SECRETARY
OF AGRICULTURE

—
AMA DOCKET NOS.
F&V 916-3 (NECTARINES)
F&V 917-4 (PLUMS & PEACHES)

IN RE: WILEMAN BROS. & ELLIOTT, INC., A CALIFORNIA
CORPORATION, AND KASH, INC., A CALIFORNIA
CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE; AND
RICHARD LYNG, AS FORMER SECRETARY OF
AGRICULTURE, RESPONDENTS

PETITION TO MODIFY VARIOUS PROVISIONS
OF THE NECTARINE, PLUM AND PEACH
MARKETING ORDERS;

AND/OR

PETITION TO TERMINATE VARIOUS
PROVISIONS OF THE NECTARINE, PLUM AND
PEACH MARKETING ORDERS;

AND/OR

PETITION TO EXEMPT PETITIONERS FROM
VARIOUS PROVISIONS OF THE NECTARINE,
PLUM AND PEACH MARKETING ORDERS AND
ANY OBLIGATIONS IMPOSED IN CONNECTION
THEREWITH THAT ARE NOT IN
ACCORDANCE WITH LAW

—
[7 U.S.C. §608c(15)(A); 7 C.F.R. §§916.1, et seq.
and 917.1, Et Seq.]

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[July 27, 1989]

* * *

I

DESCRIPTION OF PETITIONERS

A. WILEMAN BROS. & ELLIOTT, INC.

* * *

B. KASH, INC.

* * *

II

PETITIONERS' GENERAL CONTENTIONS RE WHY
VARIOUS PROVISIONS OF THE NECTARINE,
PLUM AND PEACH MARKETING ORDERS, OR THE
INTERPRETATION OR APPLICATION THEREOF
AS WRITTEN, AND/OR AS APPLIED, ARE NOT IN
ACCORDANCE WITH LAW

* * *

3. Petitioners also claim that the promulgation of the "well-matured" color chip-standard was arbitrarily and capriciously imposed upon the tree fruit industry with no substantial basis or purpose as the "well-matured" color chip standard does not objectively and rationally evaluate the internal maturity of fruit nor determine good consumer quality and/or good marketable quality.

4. Petitioners also claim that the below-described provisions of the Nectarine, Plum and Peach Orders,

in their language and/or in their application, and/or in their obligations imposed in connection therewith, are a violation of the First Amendment of the United States Constitution and the due process clause of the Fifth Amendment of the United States Constitution.

5. Petitioners also claim that various below-mentioned provisions of the Nectarines, Plum and Peach Orders are void as being an improper delegation of authority from the Secretary of Agriculture to the Nectarine, Plum, and Peach Committees, the Control Committee of the California Tree Fruit Agreement, and the Nectarine, Plum and Peach Maturity Subcommittees, and their respective appeal committees.

6. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders, as interpreted and as applied, are void as there has been no properly delegated authority to either the Nectarine, Plum and Peach Committees, the Nectarine, Plum and Peach Maturity Subcommittees, the California Tree Fruit Agreement, or the Appeals Committee.

7. Petitioners also claim that various below-mentioned provisions of the Nectarine, Plum and Peach Orders are void since the Administrative Procedure Act was not followed with respect to implementing the "laws" stated below.

8. Petitioners also claim that the various below-mentioned provisions of the Nectarine, Plum and Peach Orders, and the regulations executed thereafter, are void and not in conformity with the law with respect to all assessments levied against Petitioners with respect to peaches, plums and nectarines.

9. Petitioners also contend that the below-described provisions of the Nectarine, Plum and

Peach Marketing Orders, and the rules and regulations executed thereafter as written, and/or in their application, and/or in their obligation imposed in connection therewith, are a violation of procedural and substantive due process since, in the application of "regulations" which were not promulgated pursuant to law, or in those rules which, although promulgated pursuant to law but applied not in accordance with the law, amount to a complete "taking" of Petitioners' nectarines, plums and peaches, without just compensation and without furthering any proper governmental purpose, and without providing a pre-deprivation hearing in accordance with law.

10. Petitioners also contend that said delegation of authority to committees, made up of competitors of Petitioners, are contrary to the intent and policy of Congress in enacting the AMAA, and contrary to the Supreme Court's ruling in *Panama Refining Company v. Amazon Petroleum Corporation*, 293 U.S. 388, 55 S.Ct. 241 (1935); *Wichita Railroad and Light Company v. Public Utilities Commission*, 260 U.S. 48, 59, 43 S.Ct. 41, 55; *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935); *Carter v. Carter Coal Company*, 298 U.S. 238, 56 S.Ct. 855 (1936); *Industrial Union v. American Petroleum*, 448 U.S. 607, 100 S.Ct. 2844 (1980); and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 101 S.Ct. 2478 (1981).

11. Petitioners contend that the Secretary of Agriculture for each harvest season from 1980 through the present season, failed to engage in reasoned decision-making in establishing regulations authorizing the imposition of forced assessments, all in violation of the Administrative Procedure Act.

Further, in failing to engage in reasoned decision-making, the Secretary failed to engage in notice and comment and made no provision for notice and comment regarding;

(a) Whether the tree fruit industry benefits from a "generic" advertising program;

(b) Whether the tree fruit industry should continue year to year with the "generic" advertising program;

(c) Whether pro rata credits from the forced advertising assessments should be provided to handlers engaging in direct specific brand name advertising programs;

(d) In what manner advertising programs should be conducted;

(e) What, if any, limitations should be placed on the Committees in regards to the monetary level allowed to be expended on a "generic" advertising program;

(f) How advertising money, if any, should be spent;

(g) Which public relations firm, if any, should be retained.

12. Petitioners also contend that the Nectarine, Plum and Peach Order's monetary assessments for the 1988 season and subsequent seasons are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the Administrative Procedure Act, and that their adoption and/or collection is not in accordance with the law.

13. Petitioners also contend that the Nectarine, Plum and Peach Order's monetary assessments for the 1980 through 1988 seasons and the 1989 and subsequent seasons are invalid and unconstitutional

because at least fifty percent of said assessments compelled to be paid by Petitioners are violative of the First Amendment to the United States Constitution. The assessments are compulsory subsidization of ideological, economic and commercial activity engaged in by the Nectarine, Plum, and Peach Committees to which Petitioners object (as more completely stated below), and in contravention of the holdings in *Ahood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977), and *Chicago Teachers Union v. Hudson*, 106 S.Ct. 1066 (1986), and cases cited therein. Further, all assessments for each season were adopted and/or collected in a manner not in accordance with law, and in a manner violative of the Administrative Procedure Act. Additionally, all assessments for each season, are null and void as they were adopted and/or collected for expenditures which are not authorized by the AMAA, and/or for expenditures which are specifically prohibited by the terms of the AMAA and/or by the terms of other laws. Also, all assessments for each season are null and void because the "decisions" to make said expenditures are decisions accomplished in a manner violative of the law (including, but not limited to, public notice and participation and public decision making "in the sunshine" laws); and/or because said "decisions" to make said expenditures and said expenditures themselves were not previously approved, properly authorized in accordance with the law, by the Secretary of Agriculture; and/or because some expenditures from said assessments were for unauthorized and/or legally prohibited purposes.

14. Petitioners also contend that the Nectarine, Plum and Peach Order assessments for 1980 through the 1989 and subsequent seasons are invalid and

unconstitutional as they are violative of equal protection as applied through the Fifth Amendment's deprivation of liberty provision, in that California growers of nectarines, plums and peaches are discriminated against in relation to growers of the same tree in other states, as well as being discriminated against in relation to growers of other commodities within the State of California.

15. The interim final rules issued by the Secretary, dated May 24, 1988, and subsequent final rules, regarding the new maturity regulations, the maturity testing devices, including color chips, the color chip variance procedures, and fruit size elimination, for nectarines, plums and peaches, were invalid because the Administrative Procedure Act was not followed, and/or otherwise are not in accordance with the law as written and/or as applied, and thus are null and void.

16. The interim final rules issued by the Secretary dated May 24, 1988, and subsequent final rules, regarding the new maturity regulations, the maturity testing devices, including color chips, the color chip variance procedures, and fruit size elimination for nectarines, plums and peaches, are violative of the Administrative Procedures Act because they did not sufficiently address comments submitted, they are arbitrary and capricious, they were not premised on a substantial basis, alternatives were not considered, and/or otherwise are not in accordance with the law as written and/or as applied, and thus are null and void.

17. The budget and assessments for the Nectarine, Plum and Peach Marketing Orders for the 1980 through 1989 (and subsequent) seasons are violative of the Administrative Procedure Act since they are

improperly retroactively imposed, there is no substantial basis and purpose for said assessments and budget, the Secretary failed to review the alternatives and there is "no good cause" and/or "no emergency" exception (pursuant to Title 5, U.S.C. §553) for non-compliance with the notice-and-comment procedures in promulgating the budget and assessments for the 1980 through 1989 (and subsequent) seasons.

18. The imposition of advertising assessments by the Secretary of Agriculture pursuant to 7 C.F.R. §§916.45 and 917.39, are unlawfully imposed taxes. As by definition, the advertising assessments imposed on the tree fruit industry shall be done in the "public interest" 7 U.S.C. §608c(6)(I), advertising assessments cannot be deemed "fees", but must be categorized as "taxes", as any benefit inures to the public and not Petitioners. As a tax, the advertising assessments must be declared null and void as the Secretary of Agriculture has not been properly delegated the authority by Congress to impose taxes on the tree fruit industry.

19. The imposition of advertising assessments, pursuant to 7 C.F.R. §§916.45 and 917.39, is an unlawful delegation of the constitutional authority to levy taxes. Insufficient legislative guidelines, restrictions and limitations have been placed upon the Secretary of Agriculture for Congress to have legally delegated its taxing power. Therefore, the collection of assessment "taxes" pursuant to 7 C.F.R. §§916.41 and 917.37 are void as an improper unrestricted delegation of authority.

20. The Secretary has violated the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", and

thus denied Petitioners due process and equal protection under the law, by refusing to follow its own rule in §900.70 of Title 7, C.F.R., by continuously determining that interim relief is unavailable with respect to any administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A).

21. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid to the extent that they do *not* provide Petitioners with any timely adequate pre-taking equitable relief and do *not* provide any timely or adequate post-taking monetary relief, particularly to the extent that they do *not* afford any retrospective monetary relief or any prospective monetary damages as a result of being financially injured as a result of invalid provisions of the Nectarine, Plum or Peach Marketing Orders or their invalid application.

22. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" (Title 7, C.F.R. §900.50, et seq.) are invalid because they do not afford any timely or effective relief and thus are a violation of the due process and equal protection clauses of the United States Constitution.

23. Petitioners also contend the position of the Secretary of Agriculture was not "substantially justified." As a result of the arbitrary and capricious actions undertaken by the Nectarine, Plum and Peach Committees, their maturity subcommittees, CTFA and the United States Department of Agriculture, Petitioners should be awarded fees and expenses, including attorney's fees and the reasonable expenses of expert witnesses, pursuant to the Equal Access to

Justice Act, 5 U.S.C. §504, and/or pursuant to Federal Rules of Civil Procedure §11, and/or as otherwise allowed by law.

III

STATEMENT OF FACTS RE PETITIONERS AND THEIR CONTENTIONS

24. Petitioner Wileman Bros. & Elliott, Inc. (hereinafter referred to as "Petitioner Elliott"), and Kash, Inc. (hereinafter referred to as "Petitioner Kash") are both growers and handlers of plums and nectarines. Petitioners handle their own varieties of plums and nectarines.

25. Petitioner Kash, Inc., is also both a grower and handler of peaches.

26. Petitioner Elliott is the only grower and handler of Tom Grand nectarines. Petitioner Elliott is one of two growers of Ebony plums and one of two handlers of Ebony plums, and grows and handles a significantly greater volume of Ebony plums than one other grower of Ebony plums.

27. Petitioners market a much greater percentage of their nectarines and plums (and with respect to Kash, Inc., peaches) in the East Coast terminal markets. The fruit being shipped to the East Coast markets takes a considerably greater period of time to reach the store shelves through the terminal markets there than it does reaching the store shelves in national chainstores or in West Coast markets.

28. Nectarines, peaches and plums will continue to ripen after they reach U.S. #1 maturity, and with respect to some varieties of nectarines and plums and peaches handled by Petitioners, fruit required to b:

"well-matured" at the time of picking and packing is over-mature for purposes of marketing said fruit in the East Coast terminal markets.

29. Petitioner Elliott, as a corporation, has been a handler of nectarines and plums since 1948. Petitioner Kash, Inc., as a corporation, has been a handler of nectarines, plums and peaches, since 1968.

30. Petitioners Wileman Bros. & Elliott, Inc. and Kash, Inc., subsequent to the granting of a motion to consolidate their separate 15(A) Petitions, had their grievances heard in a hearing conducted during February and March of 1988. Said hearing was presided over by the Honorable Dortha A. Baker, Administrative Law Judge, U.S.D.A. (AMA Docket Nos. 916-1 and 917-3). Said 15(A) Petition hearing encompassed certain issues regarding the 1980 through 1987 harvest seasons for nectarines and plums. Said 15(A) Petition hearing raised a substantial number of issues relating to various provisions of the Nectarine and Plum Marketing Orders. The hearing involved the admission of substantial evidence through oral testimony, the admission of hundreds of exhibits, and other factual evidence which was admitted through judicial and administrative notice being taken by Administrative Law Judge Dortha A. Baker. Petitioners hereby request that the record of the aforementioned 15(A) Petition hearing (AMA Docket Nos. 916-1 and 917-3), to include all evidence received at said 15(A) hearing, be incorporated by reference, as though fully set forth, within this instant Petition. The parties involved in the instant action are identical to the parties involved in the aforementioned 15(A) Petition hearing conducted in 1988 (AMA Docket Nos. 916-1 and 917-3). Incorporation by reference of the record of the prior 15(A) Petition

proceeding would alleviate a substantial duplication of effort, narrow the issues and maximize judicial economy in conducting the instant 15(A) Petition hearing.

31. On or about May 4, 1988, the Nectarine Administrative Committee * * * an 18-cent per carton assessment against each container of nectarines packed by Petitioners. Of that 18 cents, only (approximately) 5 cents was for inspection of those cartons of nectarines, and over 10 cents per container was assessed against each container for "market development", which included: field staff activities; retail advertising incentives; trade communications; retail projects; point-of-sales materials; publicity; education activities; food service activities; TV and radio production; TV advertising; radio advertising; outdoor advertising; Canadian promotion; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Nectarine Administrative Committee in May, 1988, was approximately \$1,761,886.00. Petitioners object to being assessed for "market development", as described above, because said advertising and "market development" has not been shown to increase returns to Petitioners or their growers. Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioners sell their fruit, and it forces Petitioners to subscribe to ideologies and economic philosophies with which they do not agree. From 1980 through the present harvest season, over half of the assessments paid by Petitioners has been used for "market development" * * *.

32. On or about May 4, 1988, the Plum Administrative Committee * * * an 19-cent per carton assessment against each container of plums packed by Petitioners. Of that 19 cents, only (approximately) 6 cents was for inspection of those cartons of plums, and approximately 10 cents per container was assessed against each container for "market development", which included: field staff activities; retail advertising incentives; trade communications; retail projects; point-of-sales materials; publicity; education activities; food service activities; TV and radio production; TV advertising; radio advertising; outdoor advertising; Canadian promotion; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,831,459.00. Petitioners object to being assessed for "market development", as described above, because said advertising and "market development" has not been shown to increase returns to Petitioners or their growers. Petitioners object to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioners sell their fruit, and it forces Petitioners to subscribe to ideologies and economic philosophies with which they do not agree. From 1980 through the present harvest season, over half of the assessments paid by Petitioners has been used for "market development" * * *.

33. On or about May 4, 1988, the Peach Administrative Committee * * * an 18-cent per carton assessment against each container of peaches packed by Petitioner Kash, Inc. Of that 18 cents, only

(approximately) 6 cents was for inspection of those cartons of peaches, and approximately 9 cents per container was assessed against each container for "market development", which included: field staff activities; retail advertising incentives; trade communications; retail projects; point-of-sale materials; publicity; education activities; food service activities; TV and radio production; TV advertising; radio advertising; outdoor advertising; Canadian promotion; promotion research; merchandising research; promotion expense; Hispanic promotion; and miscellaneous. The total budget adopted by the Plum Administrative Committee in May, 1988, was approximately \$1,225,435.00. Petitioner Kash, Inc., objects to being assessed for "market development", as described above, because said advertising and market development has not been shown to increase returns to Petitioner Kash, Inc. or its growers. Petitioner Kash, Inc. objects to said assessments being used for advertising and promotional work since said advertising and promotional work do not reach the consumers to whom Petitioner Kash, Inc. sells its fruits, and it forces Petitioner Kash, Inc. to subscribe to ideologies and economic philosophies with which it does not agree. From 1980 through the present harvest season, over half of the assessments paid by Petitioner Kash, Inc. have been used for "market development" * * *.

34. A portion of the assessments levied against Petitioners is being utilized by the Commission and the California Tree Fruit Agreement for research projects of which the Petitioners do not subscribe. Said research projects include hiring individuals to write reports ostensibly showing that small size fruit is not desired by consumers, to write reports showing

that "well-matured" fruit is what is desired by consumers, and to pay individuals and firms for writing reports ostensibly by showing that advertising is beneficial to the industry. Petitioners contend that this type of research activity is done for the purpose of supporting more restrictive picking, packing and marketing of peaches, plums and nectarines, as intended by the Committees and CTFA, through prohibited illegal volume (quantity) control, under the guise of providing consumers with better quality fruit, to restrict the trade of and marketing by Petitioners, in a form and manner with which Petitioners do not agree. Petitioners contend that this is done by the Committee and CTFA to promote their own ideological philosophies and their own economic advantage to which Petitioners do not subscribe.

35. Petitioners also contend that a small portion of their assessments are being used to finance the California Tree Fruit Agreement and no authority has even been published in the Federal Register for notice and comment, and CTFA is an entity who has never been delegated authority pursuant to the Administrative Procedure Act. Thus, assessments used to support an entity which, by law, does not legally exist, are null and void.

36. Petitioners also contend that approximately 5-to-6 cents per container is being assessed against Petitioners to provide for inspection service to inspect fruit utilizing tests and standards that have never been lawfully promulgated, said tests and standards being utilized by the inspection service have caused Petitioners substantial losses in picking, culling (forced to discard), and marketing their fruit.

37. Any monies expended by Petitioners for promotion of their own specific brand receive no pro rata credits toward the amount of advertising assessments levied against Petitioners for the Committees' and CTFA's "generic" promotional activities.

38. California's tree fruit * * * subject to Marketing Orders 916 and 917, are the only tree fruit * * * subject to advertising assessments (other states' * * * are not required to advertise. Thus, the forced "generic" advertising program of Marketing Orders 916 and 917, benefits other states' growers and handlers of tree fruit, who are not subject to advertising assessments. For example, a consumer in Minnesota who gets an urge to purchase a California-grown peach, based on an advertisement paid for by Petitioners' assessments, does not necessarily benefit Petitioners or any other California grower or handler. When the consumer enters the grocery store and observes peaches, how does he differentiate a Georgia or Colorado peach (not subject to advertising assessments) from that of a generically advertised California peach? As a result, the marketing orders discriminate against the California handler and grower by providing unassessed advertising to handlers and growers of peaches not subject to California's marketing orders.

39. On April 8, 1988, the Secretary issued proposed rules with respect to plums with the intent to regulate out smaller-size plums, to change maturity determinations, modify requests for variances, and to define "well-matured" (53 Federal Register 11669).

40. On April 18, 1988, the Secretary issued proposed rules with respect to eliminating smaller size nectarines and peaches, and changing the maturity determinations and variances to the maturity

determinations, basically identical to the plum maturity changes. (53 Federal Register 12690 (nectarines); 53 Federal Register 12694 (peaches).)

41. With respect to the peach, plum and nectarine proposed rules, described in paragraphs 39 and 40 above, * * * a fifteen-day comment period was provided except as to plums for which a seven-day extension was granted at the request of Petitioners' counsel. These proposed rules with respect to peaches, plums and nectarines occurred four months after the respective peach, plum and nectarine committees met in December, 1987, and proposed to the Secretary the elimination of small size peaches, plums and nectarines. The peach, plum and nectarine committees also voted to approve the same maturity standards and determinations be applied for the 1988 season that were employed in the 1987 season. There was no "good cause" shown for providing less than a thirty-day comment period with respect to the issuance of each of the above-described proposed rules.

42. On May 27, 1988, the Secretary's designee issued interim final rules, purportedly binding on Petitioners, which substantially altered the maturity determinations and the procedure for changes to the maturity determinations. These interim final rules were substantially different than those proposed in the "proposed" rules issued approximately five weeks earlier. In said interim final rules, the Secretary rejected the committee's proposal to eliminate small-size plums, but at the same time, the Secretary adopted the nectarine committee's proposal to eliminate small-size nectarines. The determination by the Secretary to eliminate small-size nectarines was arbitrary, capricious, not based on a substantial

record, and the Secretary refused and failed to address objecting comments. Furthermore, Petitioners contend that the Secretary relied on false information in issuing an interim final rule with respect to the elimination of small-size nectarines, which the Secretary knew, or should have known, was false.

43. The Petitioners contend that the Secretary failed to comply with the Administrative Procedure Act's notice and comment period, and there was no "good cause" shown, for issuing an interim final rule which substantially differed from the proposed rule issued by the Secretary approximately five weeks earlier with respect to maturity determinations and maturity variances. The Secretary's proposed rule with respect to maturity for peaches, plums and nectarines stated that the Shipping Point Inspection Service was to set the color standards or other maturity tests to determine the "well-matured" standard. Further, the proposed rule granted only SPI the right and ability to vary or change color chip standards or other maturity tests. The proposed rule suggested the elimination of the Maturity Subcommittee for each of the respective committees, which had existed from 1980 through the 1987 seasons. In said proposed rule, the Secretary published, for the first time, the actual "color standards" or other "maturity tests" which the Secretary claimed the Inspection Service had established previously. The Secretary knew, or should have known that statement was false, since the Secretary knew, or should have known, that in the past 8 years, it was the Maturity Subcommittees (made up of Petitioners' competitors), which actually set the "color standards" or other maturity tests, and

changes the "color standards" or other maturity tests.

44. With respect to the interim final rules issued regarding peaches, plums and nectarines, there were additional false statements made in the interim final rules which the Secretary knew, or should have known, were false or were conclusions drawn by the Secretary which were arbitrary, capricious, or not based upon substantial evidence—many of which are stated as follows:

(a) Comments to the proposed rule not only discussed, but showed, that the maturity regulations and the size recommendations were done by the Committees for volume control. The Secretary never addressed this comment;

(b) The Secretary, with respect to nectarines, found that consumers wanted larger-size nectarines, but at the same time, found that the evidence was inconclusive with respect to consumers not desiring smaller-sized plums—despite the fact that the studies cited by the Secretary with respect to plums were the same authorities cited with respect to nectarines, and the studies did not distinguish between the two. However, only four retailers of the twenty-five retailers interviewed wanted to see the smaller sizes eliminated, and twenty-one of the twenty-five retailers interviewed wanted both the smaller and larger sizes;

(c) The report (of Ervin D. Thuerk) cited by the Secretary was directed to twenty-five "key supermarket chain executives" which represented only 38.7% share of the total industry. The Secretary failed to point out that the terminal markets were totally unrepresented in the study conducted, which

is where many handlers, including Petitioners, ship their fruit;

(d) The Secretary cites Mr. Thuerk's research for the proposition that early-season fruit (which is small in size) does not provide satisfaction to the consumer and does not encourage repeat purchases, but fails to point out that only four out of the twenty-five large supermarket chains interviewed wanted to eliminate small sizes, while the vast majority wanted to keep them. Thus, the Secretary relied on certain statements made by Mr. Thuerk, and failed to address others that would contradict the conclusions desired to be drawn by the Secretary;

(e) The Secretary rejected comments that it was too late for growers to modify their cultural practices in order to meet the more restrictive size requirements for nectarines and peaches by stating that when the Committee made its recommendations the growers had already begun to undertake cultural practices to obtain "desirable fruit size". However, with respect to plums, the Secretary contradicted this statement by stating: "Finally, it is too late this season for growers to make any cultural changes on the basis of the proposed size increases if they have not already done so." The Secretary fails to explain the difference in the two statements—one with respect to nectarines and peaches, and the other with respect to plums;

(f) In response to comments that the size proposal would reduce the volume of fruit and was thus volume (quantity) control, the Secretary stated that such a position was questionable as "small size nectarines have been a detriment to the trade and as such the industry has directed its efforts toward production and marketing of better quality and larger

size fruit". Thus, the Secretary failed to address the issue of whether there would be a reduction in the amount of fruit to reach the market and was volume control;

(g) The size regulations affect certain varieties of fruit, but was not directed at other varieties of fruit which is discriminatory, arbitrary and capricious. If consumers reject small-size fruit, they would reject the fruit with respect to all varieties, and not just some varieties. The Secretary made a false statement when he stated that since May 16, 1980, nectarines, plums and peaches "have been required to be 'well-matured' rather than 'mature'", and "this requirement has been implemented by the Federal-State Inspection Service since that time." In truth and in fact (which was known by the Secretary), the regulations which went into effect on May 16, 1980, did not state that fruit was required to be "well-matured". "Well-matured" was what the committees decided thereafter to implement on their own without any rulemaking whatsoever. The Secretary knew, or should have known, that the Federal-State Inspection Service did not set those standards in the past, but those standards were imposed by the committee of competitors made up of the plum, nectarine and peach committees and their respective maturity subcommittees, along with CTFA. The Secretary also falsely states that since 1980 "the Federal-State Inspection Service, based on its expertise, has been primarily responsible for determining which specific test or tests should be used for each variety of nectarines and which test level (e.g., particular color chip) is appropriate for each variety". The Secretary knew, or should have known, that this statement was false since the Federal-State Inspection Service has

merely occupied an advisory role with respect to the committees and their respective maturity subcommittees, who actually set the standards, changed the standards at their whim, and actually made "law", regardless of the concerns and opinions of the Federal-State Inspection Service;

(h) The Secretary also states that when the "proposed rule" was issued in April, 1988, the responsibility for issuing the maturity test, and granting variances during the seasons (with respect to those maturity tests), was proposed to be given to the Federal-State Inspection Service to "lessen the burdens on committee members." Petitioners contend that the Secretary knew, or should have known, that this was a false statement in that the proposal to provide sole responsibility to the Federal-State Inspection Service, was a direct result of the Petitioners' previously having filed and presented evidence at the Administrative Petition Proceeding which showed the unlawful delegation of authority by the Secretary to the committees and the maturity Subcommittees;

(i) The Secretary falsely stated that he proposed to continue the "requirement that not less than ninety-percent of the fruit surface shall meet the color guide established for that variety, and not less than ninety-percent of any lot shall meet the color guide established for that variety." The Secretary knew, or should have known, that this was never a "requirement", but was a determination made by the respective committees and the respective maturity subcommittees, and the Secretary had never made this "requirement" before. It was also stated in the proposed rule, with respect to maturity for nectarines, plums and peaches, issued in April, 1988, that the

Inspection Service had intended to use certain "color chips" and other maturity tests for nectarines, plums and peaches in the 1988 season, implying that the Inspection Service had actually set those "maturity tests" or other "color standards", when the Secretary knew, or should have known, that the Inspection Service has never set those standards, but these standards have been set by the respective committees and their respective maturity subcommittees—made up of Petitioners' competitors.

(j) The Secretary, in adopting the "well-matured" standard, or re-adopting the "well-matured" standard, relies in part upon Mr. Thuerk's report which is attributed by the Secretary to state that the consumers do not want early-season fruit which is picked immature, but the Secretary fails to point out that this study states that consumers do not want "immature" fruit, which is a far cry from "well-matured", and is different than fruit being "mature";

(k) The Secretary also vacuously states, in response to a comment that the "well-matured" requirement has become more restrictive than it was when implemented in 1980, that only the number of color chips have increased but the "well-matured" standard has not become more restrictive. The Secretary knew, or should have known, that his contention was false;

(l) In responding to a claim that "well-matured" fruit has caused a large increase in harvesting costs, the Secretary merely responds that the consumer "did not document this claim." The Secretary knew, or should have known, that said claim was documented through the transcripts of the hearing that occurred with respect to the Administrative Petition filed by these Petitioners and heard in

February and March of 1988. Which information was before the Secretary at the time the interim final rule was issued;

(m) The Secretary also buttresses his claim that the "well-matured standard" has been well received by growers, since, at the last referendum, a majority of those voting favored continuance of the program. He ignores the fact that the referendum was not conducted with respect to eliminating the "well-matured" standard, but was conducted with respect to a continuation or termination of the *entire* Marketing Agreement. There was no opportunity for a line-item veto of any provision. In responding to a commentor's objection to the "well-matured" standard that the standard is for the purpose of volume control as indicated by the decrease in packages shipped per acre from 1980 through 1987, even though a larger number of trees were planted per acre, the Secretary stated that this evaluation was inconclusive because the commentor did not consider other factors in addition to the "well-matured" requirement such as age of the trees, weather, cultural practices, and failure to meet other types of handling requirements such as minimum size requirements. The Secretary knew, or should have known, that his contention was false. There was a complete failure by the Secretary to document his contention that there were less cartons per acre shipped since the "well-matured" standard came into existence based upon the age of the trees, weather, cultural practices, and other handling requirements. The Secretary completely failed to comment about the fact that permitting the committees, and the maturity subcommittees, to make the decisions as to which "color chips" or other "maturity tests" should

be utilized for each variety of nectarine, plum and peach, was a violation of due process, and a violation of *Carter v. Carter Coal*;

(n) The Secretary failed to consider the comments with respect to the fact that the color standards or other maturity tests were not uniform, varied from variety to variety causing some fruit to have a shorter shelf life than other fruit, causing some fruit to be left on the trees after the fruit otherwise met a U.S. No. 1, than other varieties of fruit; caused fruit that was shipped to the East Coast to arrive in an overripe condition; failed to adequately consider the drastically increased picking costs for having a "well-matured standard", said standard has required orchards to be picked five to seven times as opposed to two or three times; failed to address comments that the specific color chips or other maturity tests lacked any substantial basis and purpose, lacked any uniformity, lacked any studies and tests to determine the amount of fruit lost or subject to a decreased sales price as a result of the overripe condition of the fruit. The Secretary has wholly failed to consider and comment upon the preliminary and tentative findings made by his own Administrative Law Judge, the Honorable Dortha Baker. Her preliminary findings were made following the conclusion of the Administrative Petition Proceedings occurring in February and March of 1988 in Fresno, California. The Secretary wholly failed to consider the testimony given under oath and the documents and exhibits presented at the administrative hearing with respect to the precise issues being stated in the Secretary's interim final rules.

45. The Secretary's statement in the interim final rules (that it is "impracticable, unnecessary, and

contrary to the public interest to give prior notice to putting this rule into effect, and that good cause exists for not postponing the effective date of this action until thirty days after publication in the Federal Register", because shipments of the crop have begun and this action should cover as much of the 1988 crop as possible, the maturity requirements are substantially the same as currently implemented and should be made effective as soon as possible, and the interim final rule relaxes maturity requirements for a couple of various varieties) is false. The Secretary knew, or should have known, that said statement is false since the new maturity requirement procedure and variance procedures are substantially different than what has occurred in the past, and substantially different than what was proposed in the proposed rule, and it is the Secretary's fault that the matter was not first published until April, 1988.

46. Petitioners contend that the well-matured standard imposed on the tree fruit industry, commencing with its adoption in 1988, and continuing through the present and subsequent harvest seasons, was implemented arbitrarily and capriciously. The use of the "color chip" does not, with any relevant degree of accuracy, determine the internal maturity of any particular variety of fruit. Further, the specific color standards and maturity requirements discriminates against fruit which genetically have less red color and favors varieties traditionally more redder in skin color.

47. Petitioners contend that the arbitrary and capricious imposition of the "well-matured" standard, through the use of color chips, imposed upon the tree fruit industry by the Secretary's adoption in 1988,

through the present and subsequent harvest seasons, fails to consider other forms of maturity tests that would be either more appropriate or logically used in conjunction with the color chip. Tests such as chemical ratio and/or sugar ratio would provide a more accurate guide to the internal maturity of the fruit, as fruit can be "well-matured" and over ripe and still fail to meet the color chip standard imposed.

48. Petitioners contend that the "well-matured" and the color chip standards fail to recognize, and make allowances for, where the fruit is marketed. Fruit shipped to the east coast must meet the same "well-matured" color chip standard as fruit shipped locally. Thus, the "well-matured" standard discriminates against handlers with markets primarily on the east coast.

49. Petitioners contend that based upon the new size regulations for nectarines and peaches, and the new maturity procedures with respect to peaches, plums and nectarines, Petitioners lost a substantial amount of fruit that would otherwise have been of good consumer quality and of good marketable quality, in the 1988 and 1989 seasons, and all future seasons wherein the rules remain in effect.

STATEMENT OF GROUNDS ON WHICH THE
NECTARINE, PEACH AND PLUM REGULATIONS
AND/OR THEIR INTERPRETATION AND/OR THEIR
APPLICATION ARE NOT IN ACCORDANCE WITH LAW

50. Petitioners contend that permitting the nectarine, plum and peach committees, and their respective maturity subcommittees, to determine the color standards or other maturity tests, and to determine whether or not a change or variance should or should not be made, and also placing authority in the new appeal committees is an improper delegation of authority by the Secretary to private industry, in violation of, among other cases, *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855 (1936). Petitioners also contend that the above-described maturity regulations, maturity-variance regulations, and the appeals regulations are a violation of the due process clause of the Fifth Amendment of the United States Constitution, under the authority of, among other cases, *Carter v. Carter Coal Co.*, *supra*, Petitioners would adopt and incorporate from the record of the prior 15(A) Petition hearing (AMA Docket Nos. 916-1 and 917-3) all oral testimony, exhibits submitted and arguments presented as relevant to the instant matter.

51. Petitioners also contend that the above-described maturity regulations, maturity variance or change regulations, and the appeal regulations constitute a taking without just compensation in violation of the due process clause of the United States Constitution. The standards have resulted, and will continue to result in a taking without just compensation under the new tests discussed in *Nollan v. California Coastal Commission*, 479 U.S.

913, 107 S.Ct. 3141 (1987); *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552, 92 S.Ct. 1113 (1972); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862; and *Kirby Forest Industries v. United States*, 467 U.S. 1, 104 S.Ct. 2187, 2196 (1984). Petitioners also contend that the implementation of the new maturity standards color chip tests, and the regulations eliminating small-size nectarines and peaches, is a violation of the Administrative Procedure Act, because:

(1) There was an insufficient notice and comment period with respect to the interim final rules, and no "good cause" was shown for not providing an appropriate 30-day notice and comment period;

(2) There was no "emergency" existing which would permit the Secretary to only provide a fifteen day notice period instead of at least thirty days;

(3) There was no emergency existing, except a self-made emergency by the Secretary, in issuing an interim final rule, as opposed to another proposed rule;

(4) Since the interim final rule, with respect to maturity procedures, was drastically different than the proposed rule issued five weeks earlier, no interim final rule should have been issued before another proposed rule was issued, and the Secretary's reliance on the emergency exceptions to justify the interim final rule is without merit or validity;

(5) There is no basis and purpose statement with respect to the new size elimination and maturity rules and regulations;

(6) The interim final rules wholly failed to address objecting comments, refused to consider other alternatives, and relied on false and misleading information that the Secretary knew to be false and/or misleading.

52. Petitioners also contend that the delegation of authority by the Secretary to the committees (made up of Petitioners' competitors) and the delegation of authority to the maturity subcommittees and to the appeals committee, are contrary to the intent and policy of Congress in enacting the Agricultural Marketing Agreement of 1937, and contrary to the Supreme Court holding in *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S.Ct. 837 (1935).

53. Petitioners also contend that the nectarine, plum and peach order monetary assessments for the 1980 through the present harvest season are invalid, not enacted according to law nor applied according to law, and were not enacted in accordance with the Administrative Procedures Act—all for the following reasons:

(a) The assessments used to fund the yearly budgets are primarily used to advance ideological principles of the committees but opposed by Petitioners in violation of the First Amendment of the United States Constitution, and contrary to the express holdings of *Ahood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782 (1977); *Chicago Teachers Union Local v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066 (1986); *Galda v. Rutgers*, 777 F.2d 1060 (3rd Cir., 1985), and *Century Communications v. FCC*, 835 F.2d 292 (D.C. Cir. 1987);

(b) Since approximately fifty percent of the assessments levied against the Petitioners are to be

used by the nectarine, plum and peach committees, and the California Tree Fruit Agreement for advancing ideological and economical beliefs to which the Petitioners do not subscribe and Petitioners are being taxed for the purposes of allowing their competitors to advance beliefs which are opposed by the Petitioners, in violation of the First Amendment of the United States Constitution;

(c) There is no substantial basis and purpose for the assessments and no substantial basis and purpose for the budget;

(d) The Secretary failed to comply with the notice and comment provisions of the Administrative Procedure Act in issuing and setting the assessments and budget for the 1988 and all 1989 harvest seasons;

(e) The authority to impose advertising assessments was improperly and unlawfully delegated to the Secretary of Agriculture by Congress without sufficient guidelines, restrictions or limitations having been established, through legislation, to constitutionally justify the broad discretionary illegal "taxing" authority extended to the Secretary of Agriculture by Congress.

54. The assessments levied by the Secretary against the Petitioners from 1980 through 1987 suffer from the same First Amendment constitutional infirmities as the 1988 and 1989 assessments with respect to illegally taxing Petitioners to promote philosophies, ideologies, economic and commercial beliefs with which they do not agree.

55. Since Petitioners have been previously involved in an administrative petition, Petitioners contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted

From Marketing Orders" do not provide Petitioners with an adequate and timely relief with respect to assessments, because:

(a) There is no pool of money nor any source of funds available to reimburse Petitioners for assessments if found to be invalid;

(b) By the time the matter is heard by the Administrative Law Judge, decided by the Administrative Law Judge, and then decided by the Judicial Officer, more assessments are levied and collected from Petitioners, or threatened to be collected from Petitioners, and it has a chilling effect upon Petitioners with respect to Petitioners subsidizing promotional work and research work with which they do not subscribe.

56. The assessments collected from Petitioners for both advertising and expenses, for every harvest season from 1980 through the present 1989 (and subsequent) seasons, are being expended in a manner violative of the laws of the United States of America and in violation of the provisions of the AMA. 7 U.S.C. §610(b)(2)(ii) authorizes collection of expense assessments for "such expenses as the Secretary may find are reasonable and are likely to be incurred by such authority or agency." Said expense and/or advertising assessments are being expended without the approval of the Secretary, for unlawful, prohibited purposes, and in a manner violative of the provisions of the AMAA.

57. The Secretary has violated the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders", with respect to maturity regulations and size regulations. The Secretary has continuously determined that no interim relief is available with respect to any

administrative petition filed pursuant to Title 7, U.S.C. §608c(15)(A), and a substantial amount of Petitioners' fruit will have to be thrown out, not picked, or not marketed because of said maturity and size regulations, for which there is no fund or money in order to reimburse Petitioners in the event they later prevail in the administrative proceedings. Said rules are invalid because they do not afford any retrospective relief or any monetary damages as a result of being financially injured as a result of the invalid nectarine, plum or peach marketing order provisions with respect to maturity and size "regulations".

58. Petitioners also contend that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any timely or effective relief and are in violation of the due process clause of the United States Constitution. Petitioners also contend that said maturity regulations and said size regulations have been established for volume control. The Secretary has failed to comply with the Agricultural Marketing Agreement Act by failing to apportion the surplus volume in an equitable and fair manner, and has discriminated against various varieties of nectarines, peaches and plums, several of which are handled by Petitioners, amounting to a denial of equal protection of the laws.

59. Counsel for U.S.D.A. in the prior 15(A) Petition (AMA Docket Nos. 916-1, 917-3) hearing argued that compensatory monetary damages are unavailable to Petitioners through the 15(A) administrative process. If this position were adopted by the Administrative Law Judge, then the entire administrative process would have no meaning whatsoever. Petitioners herein contend that as a result of the

unlawful promulgation of the illegal collection and expenditure of assessments and as a result of "well-matured" maturity and color chip standard, the smaller-size restrictions and the maturity-variance regulations, in their language and/or in their application, and/or in their obligations imposed in connection there with, that Petitioners have been monetarily damaged. Therefore, Petitioners herein contend that they are entitled to monetary damages, and that such damages may be awarded by the ALJ in the instant matter. However, if the government's position were to be adopted, Petitioners would then alternatively contend that damages must be awarded to them anyway for the untimely, ineffective and inadequate, but mandatory, exhaustion of a sham administrative process in violation of Petitioners' due process, equal protection, and other statutory rights.

60. Petitioners contend that, assuming *arguendo*, the Administrative Law Judge determines that Petitioners have been damaged through the unlawful and/or unconstitutional actions of either the Secretary of Agriculture and/or the nectarine, plum or peach committees, and if the ALF should ever further determine that there is no adequate monetary remedy available through the administrative process, then Petitioners maintain that they have both a common-law and a statutory right to a "set-off" of the levied advertising and expense assessments imposed through the marketing orders. Said above-mentioned statutory rights, include but are not limited to, the provisions of the "Debt Collection Act", 31 U.S.C. § 701, et seq. and implemented within the regulations of the U.S.D.A. at Title 7 of the Department's Code of Federal Regulations.

V

PETITION FILED IN GOOD FAITH AND NOT FOR
DELAY

61. This Petition is filed in good faith and not for the purposes of delay. Furthermore, Petitioners request an expedited hearing in this regard, and also seek interim relief.

PRAYER FOR RELIEF

62. For the reasons set forth above, Petitioners pray for the following specific relief:

A. For a ruling that §§917.460 (Plum Regulation No. 19), 917.459 (Peach Regulation No. 14) and 916.356 (Nectarine Regulation No. 14), and their respective tables showing the specific "maturity tests" or other "color standards", of the nectarine, plum and peach regulations issued in 1988, and the obligations imposed therewith, as written and/or as applied, are not in accordance with law;

B. For a ruling that the specific color standards and/or other maturity tests referenced above, as written and/or as applied are not in accordance with the law;

C. For a ruling that the various specific color standards and/or maturity tests as referenced above, as written and/or as applied, are a denial of equal protection of the laws;

D. For a ruling that the specific maturity tests and/or color standards referenced above, as written and/or as applied, result in a denial of due process of law since they amount to a taking without due process and without just compensation;

E. For a ruling that the maturity tests and/or "color standards", and the procedure in

determining said maturity tests and/or color standards, and the procedure to be utilized in requests for changes or variances to the maturity tests and the appeals, are a denial of due process of law since it constitutes an unlawful delegation of authority to Petitioners' competitors;

(F) For a ruling that the specific maturity tests and/or "color standards" referenced above, as written and/or as applied, are arbitrary, capricious and not based on substantial evidence;

(G) For a ruling that the specific maturity tests and/or "color standards" referenced above were enacted in violation of the Administrative Procedure Act and are null and void;

(H) For a ruling that the specific size regulations for nectarines and peaches, as issued as interim final rules by the Secretary in May, 1988, as written and/or as applied, were enacted in violation of the Administrative Procedure Act and are void, and/or are in actuality volume control and are contrary to the Agricultural Marketing Agreement Act;

(I) For a ruling that the specific maturity tests or specific color standards referenced above, as written and/or as applied are in effect volume control, and violative of the Agricultural Marketing Agreement Act;

(J) For a ruling that neither the Nectarine Administrative Committee, the Plum Commodity Committee, the Peach Committee, the Control Committee of the California Tree Fruit Agreement, the maturity subcommittees of any of the above-described committees nor the "appeals committee" are empowered, to set and determine, change, vary, deny changing, deny varying, or ruling on the appeal

from the denial of specific color standards, or other maturity tests;

(K) For a ruling that the assessments issued for the 1988 and 1989 harvest seasons are not in accordance with law, since they were not enacted in accordance with the Administrative Procedure Act;

(L) For a ruling that the assessments issued for 1988 and 1989 are not in accordance with law since they are violative of Petitioners' First Amendment constitutional rights;

(M) For a ruling that the assessments levied and collected from Petitioners from 1980 through 1986, and the assessments levied against Petitioners in 1987 through 1989 are not in accordance with law since the majority of the assessments are being used to pay for promotion, other forms of research, and other items reflecting the ideological, economic, philosophical, and commercial viewpoints of Petitioners' competitors, to which Petitioners do not subscribe and are violative of the First Amendment of the United States Constitution;

(N) For a ruling that the assessments levied and collected from Petitioners from 1980 through 1986, and the assessments levied against Petitioners for 1987 through 1989 and subsequent seasons are not in accordance with law as the majority of the assessments are used to pay for promotion, other forms of research, which violates the equal protection rights of Petitioners protected by the deprivation of liberty clause within the Fifth Amendment of the United States Constitution.

(O) For a ruling that the advertising and expense assessments collected from Petitioners from 1980 through 1986, and the advertising and expense

assessments levied against Petitioners in 1987 through 1989 and subsequent seasons, are being expended without the approval of the Secretary, pursuant to 7 U.S.C. § 610(b)(2)(ii), and in a manner violative of the laws of the United States of America and in violation of the provisions of the AMAA.

(P) For a ruling that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any retrospective relief or any monetary damages for financial injuries as a result of an invalid Marketing Order or Marketing Agreement regulation;

(Q) For a ruling that the "Rules of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" are invalid because they do not afford any timely or effective relief and thus are a violation of the due process clause of the United States Constitution;

(R) For a ruling that the Secretary has failed to comply with the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" for refusing to grant any form of interim relief, despite the irreparable injury that would occur in the event interim relief is not granted, and thus the Secretary has failed to follow his own rules of procedure;

(S) For a ruling that Petitioners need not exhaust their administrative remedies pursuant to the "Rules Of Practice Governing Proceedings On Petitions To Modify Or To Be Exempted From Marketing Orders" and §608c(15)(A) of the Agricultural Marketing Agreement Act, since the Secretary has already determined that Petitioners' Petition would be futile to exhaust since he had already made up his

mind and that no violation stated herein will be found to have occurred, no remedy can be afforded, no retrospective relief can be granted, and no relief at all will be granted to the Petitioners;

(T) For a ruling that the entire testimony and evidence and record of the 7 U.S.C. §608c(15)(A) Petition hearing (AMA Docket Nos. 916-1 and 917-3) conducted in February and March of 1988, involving the identical parties to the instant 15(A) proceeding, is hereby incorporated by reference into this hearing. The Administrative Law Judge hereby incorporates by reference all testimony received, all exhibits admitted and any and all judicial/administrative notice taken at the hearing conducted in February and March of 1988. The incorporation by references of the aforementioned 15(A) Petition hearing substantially reduces the likelihood of a duplication of the issues presented in the previous 15(A) hearing, will not prejudice either party to the instant action and will benefit judicial economy.

(U) For a ruling that any government claim that Petitioners have an obligation to pay the levied assessments imposed by the Secretary of Agriculture shall be "*set-off*", (pursuant to common-law set-off rights and statutory set-off rights, including 31 U.S.C. §3701, et seq., and as otherwise allowed by law), *against* the monetary damages suffered by Petitioners as a result of the unconstitutional and unlawful enforcement of the marketing orders.

(V) For a ruling that, pursuant to the Equal Access to Justice Act, 5 U.S.C. §504 and/or Federal Rules of Civil Procedure §11, due to the special circumstances herein, Petitioners are entitled to be awarded reimbursement of all their fees

and expenses, including reasonable attorney's fees and expert witnesses fees.

(W) For any and all such other and further relief deemed necessary and just.

DATED: July 27, 1989.

THE LAW FIRM OF THOMAS E. CAMPAGNE
A Professional Corporation

By /s/ THOMAS E. CAMPAGNE
THOMAS E. CAMPAGNE

By /s/ CLIFFORD C. KEMPER
CLIFFORD C. KEMPER

Attorney for Petitioners
WILEMAN BROS. & ELLIOTT, INC.
and KASH, INC.

[Verification and certificate of service omitted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. CV-F-90-473-EDP

WILEMAN BROTHERS & ELLIOTT, INC.,
A CALIFORNIA CORPORATION AND
KASH, INC., A CALIFORNIA CORPORATION, PETITIONERS

v.

EDWARD MADIGAN, SECRETARY OF AGRICULTURE;
RESPONDENT

[Filed October 7, 1991]

FIRST AMENDED COMPLAINT

COMES NOW, Plaintiff Wileman Bros. & Elliott, Inc., a California corporation and Plaintiff Kash, Inc., a California corporation (hereinafter "Plaintiffs"), who jointly and severally for and on behalf of themselves, now complain and allege of the Defendant, Edward Madigan, Secretary of Agriculture of the United States (hereinafter "Secretary"), as follows:

JURISDICTION

1. This is Plaintiffs' First Amended Complaint for review of a final administrative action by the Secretary of Agriculture, pursuant to the Agricultural

Marketing Agreement Act of 1937, as amended, 7 U.S.C. §601 et seq. (hereinafter the "Act"). This Court has original jurisdiction to review administrative action by the Secretary of Agriculture pursuant to §608c(15) (B) of the Act which provides in pertinent part as follows:

"7 U.S.C. §608c(15) (B)—the District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty (20) days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the Court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with direction either (1) to make such ruling as the Court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires . . ."

2. Pursuant to the above provisions of 7 U.S.C. §608c(15) (B), this Court should undertake a *de novo* review of the administrative trial record, as to the facts presented therein as well as to the legal conclusions drawn therefrom.

3. This Court also has jurisdiction under 28 U.S.C. §1331 as this is a civil action involving federal questions arising under the Constitution, laws or treaties of the United States. This Court further has original jurisdiction under 28 U.S.C. §1361 since this First Amended Complaint is in the nature of a complaint in equity for mandamus to compel an officer or employee

of the United States or an agency thereof to perform a duty owed to Plaintiffs.

4. Additionally, this Court has original jurisdiction as this First Amended Complaint is in the nature of a request for a declaratory judgment in equity against the Secretary of Agriculture. An actual controversy exists requiring Plaintiffs to ask this Court to declare their rights and other legal relations pursuant to 28 U.S.C. §2201. Plaintiffs are asking that further necessary or proper relief based on a declaratory judgement or decree against the Secretary of Agriculture be granted in the Plaintiffs' favor after reasonable notice and hearing determining that Plaintiffs' rights have been violated pursuant to 28 U.S.C. §2202. The Secretary's administrative action in this matter is not "in accordance with the law" as required by the Act.

5. This Court also has original jurisdiction as this is a civil action for declaratory relief and judgment, and for preliminary and permanent injunctive relief arising under the First and Fifth Amendments of the United States Constitution; the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.; Title 5, U.S.C. §§701-706); Title 7, C.F.R. §§900.50, et seq.; The Nectarine Marketing Order, Title 7, C.F.R. §§916.1, et seq. and the Plum and Peach Marketing Orders, Title 7, C.F.R. §917.1, et seq. The jurisdiction of this Court is further predicated on Title 28, U.S.C. §§1337a, 1346(a) (2) and Title 7, U.S.C. §608a(6).

VENUE

6. Venue in this Court is founded upon the above-quoted provision of the Act, namely 7 U.S.C. §608c(15) (B). Both Plaintiffs are handlers who are inhabitants,

and have their principal place of business, within the United States District Court for the Eastern District of California. Venue is further founded in this Court upon 28 U.S.C. §§1391(b) and (e) as Plaintiffs' claims against Defendant arose within the Eastern District of California. Intra-District venue is appropriate at the Fresno division of the Eastern District Court, pursuant to Local Rule 120, because Plaintiffs' claims alleged herein arose within the counties of Fresno and Tulare.

PARTIES

7. Plaintiff Wileman Bros. & Elliott, Inc., is a corporation, incorporated in the State of California, on or about May 10, 1948, with its principal place of business located in the City of Cutler, County of Tulare, within the Eastern District of California. Plaintiff Wileman Bros. & Elliott, Inc., is a grower, packer, shipper and handler of plums and nectarines, all grown in the Eastern District of California.

8. Plaintiff Kash, Inc., is a corporation, incorporated in the State of California, on or about May 28, 1968, with its principal place of business located in the City of Parlier, County of Fresno, within the Eastern District of California. Plaintiff, Kash, Inc., is a grower, packer, shipper and handler of plums, nectarines and peaches, all grown in the Eastern District of California.

9. The Secretary of Agriculture, Edward Madigan, is sued in his official capacity as the Secretary of Agriculture, Washington, D.C., and in that capacity exercises authority over and is responsible for the Department Of Agriculture and all its subsidiary organizations and boards established pursuant to the Agricultural Marketing Agreement Act found at,

Title 7, U.S.C. §601, et seq. At all times mentioned herein, the Secretary of Agriculture, Edward Madigan, in his official capacity, was responsible for overseeing and regulating the various Nectarine, Plum and Peach Commodity Committees established pursuant to Title 7 C.F.R. §§916.1, et seq. and 917.1, et seq., and their employees and agents. Defendant maintains his principal place of business at Washington, D.C.

10. Plaintiffs, by and as a result of this instant First Amended Complaint, do *not* seek to modify or be found exempt from any laws of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. §601, et seq.). Nor do Plaintiffs seek to be exempt from or to modify any Marketing Order lawfully promulgated pursuant to the Agricultural Marketing Agreement Act of 1937. By this First Amended Complaint, Plaintiffs contend that the Secretary's claim that his purported regulations constitute the provisions of the Federal Marketing Orders with respect to the handling of nectarines, plums and peaches is without any legal authority. The Commodity Committees' purported regulations prescribed so-called "maturity standards" and "color standards" to be used in determining "well-matured" maturity requirements for various varieties of nectarines, plums and peaches, including those grown by and/or packed and shipped by Plaintiffs. The Nectarine, Plum and Peach Committees' purported "maturity standards" and "color standards" which the Secretary claims to be lawful, are far more stringent and restrictive than what Plaintiffs contend to be the true lawfully authorized regulations which are prescribed under the Nectarine, Plum and Peach Marketing Orders (Title 7, C.F.R. §§916.1, et seq. and 917.1, et seq.)

11. By this First Amended Complaint, Plaintiffs do not seek to modify or become exempt from any law. Rather, Plaintiffs seek a determination as to whether the Secretary's assertions are the law. Plaintiffs herein seek declaratory relief from this Court to the effect that Defendant's asserted "regulations" were *not* in fact lawful regulations.

12. The Secretary of Agriculture is responsible, pursuant to §608c of the Agricultural Marketing Agreement Act (7 U.S.C. §601, et seq.), for the issuance, amendment and administration of Marketing Orders regulating the handling of fresh nectarines, plums and peaches and the promulgation of rules and regulations to effectuate the terms and provisions of such Orders [§§608c(1)]. Pursuant to these provisions, the Secretary has issued the Nectarine Marketing Order at 916 (7 C.F.R. §§916.1-916.356) the Plum and Peach Marketing Order at 917 (7 C.F.R. §§917.1-917.60); and Secretary promulgated and/or failed to promulgate certain regulations thereunder which are herein challenged by Plaintiffs.

13. Within the Secretary's capacity, he appoints individuals engaged in the production and processing of nectarines, plums and peaches to serve on committees known as the Nectarine Administrative Committee, the Plum Commodity Committee and the Peach Commodity Committee, which committees are appointed by the Secretary in order to, inter alia, recommend to the Secretary rules and regulations governing the handling of nectarines, plums and peaches, to include Plaintiffs.

14. Edward Madigan, in his capacity as Secretary of Agriculture, exercises authority over and is responsible for the Department of Agriculture and all its subsidiary organizations and committees

established pursuant to the Agricultural Marketing Agreement Act. The Department of Agriculture has several branches, including the Agricultural Marketing Service which has been delegated the authority by the Secretary of Agriculture to monitor the various commodity committees, to recommend regulations and to regulate nectarine, plum and peach handlers.

15. The Secretary appoints the members of the administrative committees pursuant to his authority under the AMAA [7 U.S.C. §610(b)(1)]. The committees then employ the California Tree Fruit Agreement to handle the ministerial functions of the committees. The composition, duties, and powers of these committees are set forth in Marketing Orders 916 and 917, issued by the Secretary based on Marketing Agreements entered into with handlers. Under these orders, regulations governing the size and grade of fruit may be promulgated *by the Secretary* upon a finding that such regulations will tend to effectuate the policies of the Act.

16. Another subdivision or office of the Department of Agriculture is the position of Judicial Officer, which was established pursuant to the Schwellenbach Act of April 4, 1940 (Codified as 7 U.S.C. §§450c-450g), and Reorganization Plan No. 2 of 1953, (18 F.Reg. 3219 (1953), reprinted in 5 U.S.C. App. at p. 1068 (1982)). The Secretary of Agriculture's present Judicial Officer was appointed in January, 1971 (by the then Secretary of Agriculture), after having been involved with the Department's regulatory program since 1949. Upon information and belief Plaintiffs' allege that within the Department of the Judicial Officer and/or within the Department of Agriculture, Administrative Law Judges are appointed to serve in

the capacity of hearing officers with respect to administrative petitions filed by handlers of agricultural products, including those engaged in the handling of nectarines, plums and peaches. Administrative Law Judges entertain and issue rulings with respect to administrative petition proceedings brought by handlers pursuant to Title 7, U.S.C. §608c(15)(A), which decisions by the Administrative Law Judges are reviewed, upon request, by the Judicial Officer. The Department has formulated the Rules Of Practice Governing Administrative Petition Proceedings Brought Pursuant To Title 7, U.S.C. §608c(15) (A), contained in Title 7, C.F.R. §§900.50, et seq.

17. Plaintiffs directly compete in marketing their nectarines, plums and peaches with the Secretary's appointed members of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees, who all market their nectarines, plums and peaches in California, as well as throughout the United States, and who oftentimes compete for Plaintiffs' buyers, brokers, and growers.

18. All of the acts, conduct and functions undertaken by the Secretary and/or his employees and agents were undertaken under color of federal law, ostensibly as agents and/or employees of the Secretary of Agriculture.

19. Beginning no later than 1979 and continuing through and including the 1991 harvest seasons, the Secretary of Agriculture has failed to oversee his subordinates and allowed the Agricultural Marketing Service and the Secretary's designated commodity committee members and their employees to unlawfully create "law." This has forced Plaintiffs to cull, throw out, and/or not pick good quality, healthful,

nutritious and otherwise marketable nectarines, plums and peaches, based upon regulations unlawfully implemented and enforced by the Nectarine Administrative Committee, the Plum and Peach Commodity Committees and their employees, the California Tree Fruit Agreement, without first providing Plaintiffs with a hearing, as guaranteed by the due process clause of the Fifth Amendment of the United States Constitution.

20. Prior to May of 1980, Nectarine Regulation No. 9, Plum Regulation No. 15 and Peach Regulation No. 14 required nectarines, plums and peaches to meet the requirements of U.S. No. 1 grade. Said regulations stated that when used herein [U.S. No. 1] shall have the same meaning as set forth in United States Standards for Grades of Nectarines, Plums and Peaches. U.S. No. 1 Standard means that point where the fruit has reached that stage in the maturity process that it will continue to ripen after being picked from the tree.

21. In 1980, proposed rules were issued by the Secretary for nectarines, plums and peaches which still required nectarines, plums and peaches to meet the requirement of U.S. No. 1 grade, however, the nectarine, plum and peach provisions went on to add (and it remained the same through 1987): "provided, that maturity shall be determined by the application of color standards by variety or such other tests as *determined to be proper by the Federal or Federal-State Inspection Service.*" The provisions continue to state that U.S. No. 1 means the same as defined in the United States Standards for Grades of Nectarines, Plums and Peaches.

22. The Nectarine Administrative Committee and the Plum and Peach Commodity Committees, desir-

ing a "higher" maturity standard, requested the Federal-State Inspection Service (SPI) [meaning, Shipping Point Inspection] to raise the maturity level. The committees were advised by SPI that they could not change the U.S. Standard because it applied to all states. The committees were further advised that if they desired a "higher" maturity level for the fruit, they should get the Marketing Order amended to require a "well-matured" standard.

23. The members of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees, without authorization from the Secretary, and in direct violation of the Act, took it upon themselves to create a "higher" maturity level. Pursuant to the directions of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees, the California Tree Fruit Agreement (CTFA) (as employees of the Committees) unlawfully issued new "regulations." in what was referred to as Nectarine Bulletin No. 1, the California Tree Fruit Agreement supplied to all growers and handlers of nectarines a bulletin which "sets forth everything you need to know about Nectarine Regulations for the 1980 marketing season. The bulletin states that all varieties of nectarines will be U.S. No. 1 with the following exception:

"Maturity—nectarines shall be 'well-matured' which means that they meet the color standard established for each variety. This maturity requirement is more advanced than the maturity requirement of the U.S. #1 grade."

24. Nectarine Bulletin No. 1 went on to indicate the authority for the new "maturity" standards, and on page 3 stated:

"Your attention is directed to the new and advanced maturity requirements set forth on page 1 of this bulletin. This new maturity regulation was adopted by the *Nectarine Administrative Committee*. The new maturity level is based on color levels that have been developed and established by the Inspection Service and an industry maturity sub-committee. The color standards will be applied on a varietal basis and the maturity sub-committee will be available to deal with any maturity problems that arise."

25. Immediately following the release of Nectarine Bulletin No. 1, the California Tree Fruit Agreement, on May 15, 1980, issued Plum Bulletin No. 1 which "sets forth everything you need to know about Plum Regulations for the 1980 marketing season." This bulletin stated:

"Maturity — plums shall be "well-matured"

which means that they meet the surface color, flesh color or 'spring' requirements applicable to each variety or they meet the ground color standard established on a varietal basis. This maturity requirement will be more advanced than the maturity requirement of the U.S. No. 1 grade."

26. Plum Bulletin No. 1, went on to explain the justification for this new maturity requirement, and stated on page 3:

"Your attention is directed to the new and advanced maturity requirement set forth on page 1 of this bulletin. The new maturity level involves ground color standards which have been developed and established by the Inspection Service and an industry maturity sub-committee. These new standards will be applied when plums fail to meet

surface color, flesh color or 'spring' requirements. 'Equivalent maturity' criteria will no longer be applied. A maturity sub-committee will be available to deal with unusual maturity problems. Set forth on addendum #2 are surface color, flesh and 'spring' requirements for most varieties. For maturity requirements for any variety not listed consult a supervising inspector. It is to be noted that maturity requirements must be met at *time of picking*." [The Peach Bulletin No. 1 read virtually identically].

27. These "well-matured" regulations were, through and including the 1987 harvest season, never adopted by the Secretary of Agriculture, nor did they ever go through the Administrative Procedure Act process, nor were they ever published in the Federal Register.

28. Subsequent to the committees' unlawful creation of 2 the "well-matured" standard, the Nectarine Administrative Committee and the Plum and Peach Commodity Committees established, without authority from the Secretary, "maturity sub-committees." The maturity sub-committees were comprised of members of their respective committees. The purpose of the "sub-committee" was to determine if a variance from a particular color standard should, or should not, be granted to a particular handler during each harvest season.

29. Commencing with the 1980 tree fruit season, CTFA (employees of the Nectarine Administrative Committee, the Plum and Peach Commodity Committees) would *recommend* to the committees particular color standards to be initially applied for each harvest season. The members of the Nectarine

Administrative Committee, the Plum and Peach Commodity Committees would make the final determination. The Federal-State Inspection Service did not, and was not allowed to, determine what the color standard would be for any particular variety. The committees, or their appointed sub-committees (made up of members of the committees), were the only persons allowed to establish, change, or authorize a variance from, the color standard. At no time did the committees or the CTFA personnel permit SPI to ignore a particular color standard or override a particular color standard when the inspectors felt that the fruit was otherwise "well-matured." Even when SPI and the CTFA employee believed that the fruit was "well-matured" if it did not meet the particular color standard for that variety, it could not be shipped unless the sub-committee voted to grant a variance or to change a particular color standard. If the particular committee or sub-committee refused to grant a variance, SPI would not allow the fruit to be shipped.

30. When the color chips, representing the Nectarine Administrative Committee and the Plum and Peach Commodity Committees' color standards for maturity, were first developed and used in 1980 as the "law," SPI felt that the designated—"color standards" for a particular variety represented a "well-matured" piece of fruit. However, of the 79 varieties of nectarines listed having color standards, 45 have since increased in maturity requirements, making it clear that the committees wanted even higher maturity than the "well-matured" standard that was implemented in 1980. Control of the "well-matured" maturity standard and the variance request procedure allowed the Nectarine Administrative Com-

mittee and the Plum and Peach Commodity Committee members to constrict supply during certain parts of the season, capturing for themselves the "marketing windows" in which tree fruit commanded premium prices, thus causing significant losses to Plaintiffs in wasted fruit and reduced revenues.

31. Beginning no later than 1980 and continuing through and including the 1987 harvest season, the members of the Nectarine Administrative Committee and the Plum and Peach Commodity Committees unlawfully imposed increasingly more stringent standards with respect to maturity and size of nectarines, plums and peaches. This has caused Plaintiffs to throw out, or not pick, an ever-increasing amount of nectarines, plums and peaches. For example, during the 1986 harvest season, Plaintiff Wileman Bros. and Elliott was forced to throw out, and was precluded from packing because of regulations unlawfully issued by the commodity committees under color of federal law, in excess of Four Hundred Thousand Dollars (\$400,000.00) worth of nectarines and plums, which would otherwise have been of good consumer quality, healthful, nutritious and which would have returned a good market price.

32. Further, as another example, during this same 1986 harvest season, Plaintiff Kash, Inc. was forced to throw out, and was precluded from packing (because of the regulations unlawfully issued by the commodity committees under color of federal law), in excess of Two Hundred Thousand Dollars (\$200,000.00) worth of nectarines, plums and peaches, which would otherwise have been of good consumer quality, healthful, nutritious and which would have returned a good market price.

33. Following the 1986 harvest season, Petitioner Wileman Bros. and Elliott, Inc., filed an Administrative Petition with the Department of Agriculture pursuant to Title 7, U.S.C. §608c(15) (A). Said Petition contested the validity of the maturity regulations for nectarines. Pursuant to the Rules Of Practice Governing Administrative Petition Proceedings, Plaintiff Wileman Bros. & Elliott, Inc. requested interim relief (Title 7, C.F.R. §900.70), claiming that Plaintiff Wileman Bros. & Elliott, Inc. would again lose a substantial amount of fruit, at considerable expense, if interim relief was not granted pending the outcome of the Administrative Petition proceeding. The Department opposed the Motion and the Secretary, through his Judicial Officer, subsequently denied the Motion claiming that administrative interim relief is never available, pursuant to the provisions of the Act. Plaintiff Wileman Bros. & Elliott, Inc. then filed a Motion For Expedited Hearing before the Secretary, prior to the 1987 harvest season, so that Plaintiff Wileman Bros. & Elliott, Inc. would not again have to throw out good quality nectarines because of the "well-matured" regulations unlawfully imposed by the commodity committees under color of federal law. The Secretary opposed the Motion and the Secretary, through his Judicial Officer, denied the Motion.

34. Subsequently, Plaintiff Kash, Inc. joined Plaintiff Wileman Bros. & Elliott, Inc. and sought declaratory and injunctive relief before the United States District Court for the Eastern District of California (CV-F-87-392 EDP) seeking to preclude the Nectarine Administrative Committee and the Plum Commodity Committee, through their employees, the California Tree Fruit Agreement, from imposing the

unlawful maturity regulations during the 1987 harvest season. The Secretary, defended by the U.S. Attorney's Office for the Eastern District of California, moved to dismiss the Complaint on the grounds that Plaintiffs were compelled to exhaust their administrative remedies before the Department of Agriculture. Plaintiffs argued that the District Court Judge should not dismiss their Complaint seeking declaratory and injunctive relief because the administrative process is not timely or effective and does not allow for monetary relief at the conclusion of the administrative process. Plaintiffs further argued that the administrative process does not provide any interim relief while the matter is being litigated, thus, Plaintiffs were being denied due process and therefore must not be required to "exhaust their administrative remedies." The U.S. District Court Judge dismissed Plaintiffs' Complaint on the basis that jurisdiction did not exist for the District Court to hear the matter and Plaintiffs were required to proceed through the administrative process. As a result, Plaintiffs were unable to secure relief; the District Court determined that it did not have jurisdiction, and the Secretary, through his Judicial Officer, ruled that interim relief is unavailable in the administrative arena.

35. Plaintiffs appealed the District Court Judge's dismissal to the Ninth Circuit Court of Appeals (*Wileman Bros. & Elliott, Inc., et al. v. Richard Lyng, Secretary of Agriculture, et al.*, (9th Cir. CA No. 87-2938). During oral argument before the Ninth Circuit Court of Appeals, the Justices asked whether, pursuant to 5 U.S.C. §706(l), the Court had the jurisdiction to compel the Secretary of Agriculture to promptly complete the U.S.C. §608c(15)(A) Petition

proceeding. Plaintiffs argued that the Court did have that authority, however, unless interim relief was ordered by the 9th Circuit to be provided either by the Agency or the Federal Courts, Plaintiffs would remain without a remedy for losses incurred during each harvest season by being forced to comply with unlawful regulations, since the Secretary, through his Judicial Officer, will never award monetary damages for losses sustained.

36. The Ninth Circuit in *Wileman Bros. and Elliott, Inc., et al. v. Clayton K. Yuetter, et al.* (9th Cir. 1990) 87-2938, reluctantly upheld the Decision of the U.S. District Court, and concluded their opinion:

"Forced as we are to affirm dismissal for failure to exhaust, and despite our efforts to induce settlement, we are appalled by the failure of the Secretary to deal expeditiously with the substantial grievances alleged in this Complaint. We have waited in vain since December 12, 1988 for news of a final appealable order by the Secretary. We wait no longer. We remand to the District Court for determination, under 5 U.S.C. §706(1), whether the Secretary's action has been 'unreasonably delayed,' in which case the District Court shall order the Secretary to expedite final disposition of the administrative proceeding in this case. In addition, the District Court may wish to order the Secretary to advise it promptly of the Secretary's expected final administrative decision date. Any further appeals shall be directed to the attention of this panel."

37. The denial by the U.S. District Court of the declaratory and injunctive relief requested by Plaintiffs, coupled with the Department of Agriculture's

refusal to provide either interim relief or an expedited hearing to Plaintiffs, forced Plaintiffs to throw out, during the 1987 harvest season, a substantial quantity of nectarines, plums and peaches which were otherwise of good consumer quality.

38. Thereafter, Plaintiff Kash, Inc. filed an Administrative Petition, pursuant to Title 7, U.S.C. 20 §608c(15) (A), contesting the unlawful implementation and enforcement of the maturity regulations for nectarines and plums, and contesting the assessments imposed upon Kash, Inc. Thereafter, Plaintiff Wileman Bros. & Elliott, Inc. filed an Amended Petition, pursuant to Title 7, U.S.C. § 608c(15) (A), contesting the unlawful implementation and enforcement of the maturity regulations for nectarines and plums, and contesting the assessments imposed upon them by the Secretary of Agriculture.

39. Plaintiffs then attempted to consolidate the two Petitions as the issues raised in each Petition were identical and in order to reduce the costs and attorney's fees involved. The Department of Agriculture opposed the Motion but later acquiesced to said consolidation. However, a hearing was not set until February, 1988.

40. Subsequent to the filing of the Administrative Petition, Plaintiffs brought an action in State Court under the Cartwright Act, alleging antitrust violations against members of the Nectarine Administrative Committee and the Plum Commodity Committee, as well as the field director of the California Tree Fruit Agreement, pursuant to California Business and Professions Code §16700, et seq. The named Defendants therein removed the action to Federal Court. The District Court for the Eastern District of California granted Defendants' Motion To Dismiss

the action on the basis of: (1) an antitrust exemption in the Act, (7 U.S.C. §608b); and (2) approval of Defendants' activities by the Secretary (CV-F-88-251 REC). Plaintiffs subsequently appealed the District Court Judge's dismissal of the Cartwright antitrust action to the 9th Circuit Court of Appeals (*Wileman Bros. & Elliott, Inc., et al. v. LeRoy Giannini, et al.*, (9th Cir. 1990) 909 P.2d 332. The Ninth Circuit Court of Appeals reversed the District Court ruling, stating that as a matter of law the Defendants were not immune for the actions alleged in the Complaint [See Exhibit "A" to First Amended Complaint, attached hereto].

41. Following the conclusion of the Administrative Petition hearing, conducted in February and March of 1982, and following full briefing on the merits, the trial Judge, Administrative Law Judge Dorothea A. Baker, granted Plaintiffs' Petitions (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3). In this regard, Judge Baker's Decision and Order held that the "maturity standards" and "color standards" imposed upon the industry by the Nectarine Administrative Committee and the Plum Commodity Committee (the "well-matured" standard), were not in accordance with law because those rulemaking actions were never promulgated pursuant to the requirements of the Administrative Procedure Act, Marketing Orders 916 and 917 and/or the Agricultural Marketing Agreement Act [See Exhibits "B" and "C" to Complaint filed herewith for a copy of Administrative Law Judge Baker's Preliminary Findings of Fact and Decision and Order, respectively].

42. Having suffered an adverse ruling before the trial Judge, counsel for the Secretary of Agriculture appealed Administrative Law Judge Baker's Decision

and Order to the Secretary himself. The Secretary of Agriculture designated Donald A. Campbell as the Secretary's designee to hear the appeal brought by the Secretary's counsel. Counsel for the Secretary filed the Secretary's appeal on June 30, 1989.

43. Subsequently, pursuant to Title 28, U.S.C. §§144 and 455, Plaintiffs filed a Motion To Recuse and/or Disqualify Judicial Officer Campbell from handling the Secretary's appeal of Judge Baker's Decision and Order. Plaintiffs alleged that Judicial Officer Campbell was biased, prejudiced and predisposed to rule in favor of his employer, the Secretary of Agriculture. This was based, in part, on the fact that the Judicial Officer *always* rules in favor of the Department. Further, Judicial Officer Campbell, unlawfully and without authority, refused to allow the Administrative Law Judge who heard a subsequent *Wileman Bros. & Elliott, Inc. and Kash, Inc.* Administrative Petition (AMA Docket Nos. F&V 916-3 and 917-4), to write the initial decision in that matter. Instead, Judicial Officer Campbell, unlawfully and unethically, removed the trial Judge, Administrative Law Judge Dorothea A. Baker, and replaced said Administrative Law Judge with himself prior to the issuance of the ALJ's recommended Decision. On April 6, 1990, Judicial Officer Campbell, himself ruling on Plaintiffs' Motion to Recuse, denied Plaintiffs' Motion.

44. The trial Judge, Dorothea A. Baker, in AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3, made a substantial number of findings of fact and conclusions of law based on the testimony received through the witnesses, the exhibits admitted into evidence and the applicable law. She specifically found:

- (a) The members of the Nectarine Administrative Committee and the Plum Commodity Committee are handlers who directly compete with Plaintiffs for buyers and brokers;
- (b) The members of the Nectarine Administrative Committee and the Plum Commodity Committee, themselves, unlawfully established the "well-matured" standard and set the "maturity standards" and "color standards" for nectarines and plums at a much more stringent level than authorized by law;
- (c) The promulgation of the "well-matured" standard, the setting of the "maturity standards" and the specific "color standards," by the members of the Nectarine Administrative Committee and the Plum Commodity Committee had the effect of preventing and restraining Plaintiffs from marketing various varieties of their nectarines and plums at times when Plaintiffs could have otherwise lawfully marketed said nectarines and plums at a much better return to Plaintiffs and their growers;
- (d) The members of the Nectarine Administrative Committee and the Plum Commodity Committee unlawfully promulgated the "well-matured" standard, established the "maturity standards" and the "color standards," at a level much more stringent than the law permitted so to increase Plaintiffs' cost of production and harvest and to limit the quantity of nectarines and plums harvested, packed and marketed by Plaintiffs in order to

- increase the marketing capacity and price paid for the committee members' own tree fruit;
- (e) The members of the Nectarine Administrative Committee and the Plum Commodity Committee, unlawfully formed their own maturity sub-committees for purposes of allowing variances from the "well-matured" standard in an attempt to legitimize their increasing and/or decreasing the "maturity standards" and "color standards" for various varieties of nectarines and plums so as to improve the committee members' own market position;
- (f) The members of the Nectarine Administrative Committee, the Nectarine Maturity Subcommittee, the Plum Commodity Committee, the Plum Maturity Subcommittee, as well as the California Tree Fruit Agreement agents and field director, have unlawfully engaged in favoritism with respect to dealing with handlers and growers to the detriment of Plaintiffs;
- (g) The promulgation of the "well-matured" standard and the enforcement of the "maturity standards" and "color standards" imposed on the tree fruit industry by the Nectarine Administrative Committee and the Plum Commodity Committee were *never* approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the administrative Procedure Act (Title 5, U.S.C. §551, et seq.);

- (h) The Federal-State Inspection Service (SPI) did not meaningfully determine the "color standards" nor "maturity standards," by variety, for either plums or nectarines;
- (i) Although the Federal-State Inspection Service (SPI) had input on occasion with respect to whether or not maturity standards and specific color standards should be increased or decreased, per variety, their recommendations and input were not final and binding, but, were mere recommendations which could be accepted or rejected by the Nectarine Administrative Committee, the Nectarine Maturity Sub-committee, the Plum Commodity Committee and the Plum Maturity Sub-committee;
- (j) The Nectarine Maturity Sub-committee and the Plum Maturity Sub-committee were unlawfully created by the members of the Nectarine Administrative Committee and the Plum Commodity Committee. The creation of the Sub-committees was never approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (k) The procedure established to grant or deny a variance from the "maturity standard" and "color standard" enforced by the Nectarine Maturity Sub-committee and the Plum Maturity Sub-committee was never approved by the Secretary of Agriculture, never published in the Federal Register and failed

to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);

- (l) When the Nectarine Administrative Committee, the Plum Commodity Committee or their respective Sub-committees changed the specific "maturity standard" and "color standard" from a lower color chip to a higher color chip, the ostensible law changed as well. The changes to the "maturity standard" and "color standard" were never approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (m) The "well-matured" maturity standard and the "color standards" unlawfully promulgated and enforced by the members of the Nectarine Administrative Committee and the Plum Commodity Committee were artificial determinators which did not necessarily reflect whether the fruit was "well-matured" or not;
- (n) The "maturity standards" and "color standards" unlawfully forced on the tree fruit industry by the members of the Nectarine Administrative Committee and the Plum Commodity Committee are arbitrary and capricious and fail to adequately reflect the internal maturity of nectarines and plums;
- (o) The Secretary provided no definition of the terms "higher" maturity and "well-matured" maturity. There are degrees of differences

between a "higher" maturity test and a "well-matured" maturity test. There can be fruit which is well-matured and over-ripe which still does not meet the color chip test for "well-matured" maturity;

- (p) The specific "color standards" and maturity requirements for nectarines discriminates against nectarines which have less red color and favors nectarines, particularly the newer varieties, that are almost red. The later varieties reach and exceed the specific color standard used to designate "well-matured" fruit prior to the fruit ever actually becoming "well-matured;"
- (q) Plaintiffs ship a vast majority of their nectarines and plums out of the State of California, with the majority shipped to the mid-west and east coast. It is unrealistic to conclude that a nectarine or plum packed for overnight delivery and a nectarine or plum packed for delivery thousands of miles away will both arrive with the same shelf life. The same unlawful maturity requirements and "color standards" are applicable regardless of where the fruit may be sold. The timing in which nectarines and plums reach their ultimate market is a factor entering into the economic and monetary return. There is no uniformity between the various varieties of nectarines and plums as to the "shelf life" remaining after a particular variety reaches the "well-matured" maturity standard;

- (r) The Nectarine Administrative Committee, the Plum Commodity Committee and their respective maturity Sub-committees are able to use the "maturity standards" and "color standards" as a form of volume control, allowing the committee members to delay picking, packing and shipping of Plaintiffs' nectarines and plums for purpose other than insuring that good quality fruit reaches the market;
- (s) The members of Nectarine Administrative Committee and the Plum Commodity Committee have unlawfully delegated authority to the California Tree Fruit Agreement personnel. This authority has never been approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (t) The California Tree Fruit Agreement field agents have been unlawfully granted authority by the Nectarine Administrative Committee and the Plum Commodity Committee to preclude handlers and growers' requests for specific "maturity standard" and "color standard" modifications, variances and/or changes. This authority has never been approved by the Secretary of Agriculture, never published in the Federal Register and failed to comply with the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);

- (u) The failure of the Secretary of Agriculture to disapprove the rulemaking actions of the members of the Nectarine Administrative Committee and the Plum Commodity Committee does not imply that the Secretary approved the Committees' creation of "law." The creation of "law" must be approved by the Secretary of Agriculture subsequent to publication in the Federal Register and after allowing interested persons an opportunity to provide notice and comment, pursuant to the requirements of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.);
- (v) The administrative process, with respect to the Nectarine and Plum Marketing Orders, does not provide an effective, timely and adequate remedy. Plaintiffs have suffered substantial losses as a direct result of the Nectarine Administrative Committee and Plum Commodity Committee's "maturity regulations" and "color standards." Yet, there are no provisions in either the Nectarine Marketing Order, the Plum Marketing Order or the Agricultural Marketing Agreement Act which would recompense Plaintiffs for their monetary damages.
- (w) Plaintiffs have been denied due process of law because the Rules Of Practice Governing Procedures On Petitions To Modify Or To Be Exempted From Marketing Orders, coupled with the Secretary's summarily denying interim relief, do not afford Plaintiffs timely or effective relief;

- (x) Plaintiffs established through the course of the Administrative Petition proceeding that they have suffered financial injury from the invalid operation of Marketing Orders 916 and 917. The amount of recovery shall be determined in a subsequent hearing for that purpose. [See Exhibits "B" and "C" attached hereto].

45. On July 9, 1990, the Secretary of Agriculture, acting through his designee, Judicial Officer Campbell, issued a Decision and Order reversing Administrative Law Judge Baker's Findings Of Fact and Conclusions of Law and dismissed Plaintiffs' Petitions.

46. The Secretary's Decision and Order (filed herewith as Exhibit "D" to the First Amended Complaint) concluded that, despite Administrative Law Judge Baker's conclusions to the contrary, Plaintiffs could not challenge the "well-matured" maturity standards and "color standards;" the regulatory requirements necessary to be complied with, pursuant to the Administrative Procedure Act, were satisfied; the imposition of the "well-matured" maturity standards and "color standards" were not arbitrary, capricious nor were they applied discriminatorily; notwithstanding the admitted discriminatory treatment afforded Plaintiffs, the Secretary, by not disapproving the Commodity Committees' imposition of the "well-matured" maturity standards and "color standards," tacitly approved the Committees' rulemaking actions.

47. From the 1980 through and including the 1987 harvest seasons, the Secretary of Agriculture never published in the Federal Register, nor issued

pursuant to Marketing Orders 916 and 917, any regulations which affirmatively increased the maturity standard from U.S. No. 1 to the "well-matured" maturity standard.

48. The Ninth Circuit Court of Appeals in reversing the District Court Judge's dismissal of the Cartwright antitrust matter (*Wileman Bros. & Elliott, Inc., et al. v. LeRoy Giannini, et al., supra*), (Exhibit "A" as referred to in Paragraph 40, *supra*), analyzed the history of the unlawful creation and implementation of the "well-matured" maturity standard and its attendant "color standards." The Ninth Circuit's analysis is in conformity with the Decision and Order issued by the trial Judge, Administrative Law Judge Dorothea A. Baker (Exhibit "B"), and is diametrically opposed to the Secretary's findings as set forth by his designee, Judicial Officer Campbell, in his Final Decision and Order (Exhibit "D"). The Ninth Circuit specifically found that:

- (a) The language adopted in 1980 with respect to increasing the "maturity" standards was ambiguous. The language in the regulations did not support departing from the basic maturity standard (U.S. No. 1, 7 C.F.R. §52851.1530, 2851.3153);
- (b) From 1980 through and including the 1987 harvest seasons, the Secretary of Agriculture never published in the Federal Register, nor issued pursuant to Marketing Orders 916 and 917, any regulations which affirmatively increased the maturity standard from U.S. No. 1 to the "well-matured" maturity standard.
- (c) The members of the Nectarine Administrative Committee and the Plum Commodity

Committee were not authorized to promulgate and enforce "higher" maturity standards;

- (d) The Shipping Point Inspection Service was not authorized to establish and/or implement a "higher" maturity standard;
- (e) The regulations promulgated by the Secretary and published in the Federal Register in 1980 did not authorize the creation and/or implementation of a "higher" or "well-matured" maturity standard;
- (f) The promulgation of the "well-matured" maturity standard by the use of "color standards" was unlawfully instituted by the members of the Nectarine Administrative Committee and the Plum Commodity Committee and their employees, the California Tree Fruit Agreement personnel. The Secretary's failure to disapprove the Committee members' actions does not legitimize the "well-matured" maturity standard. Non-disapproval is equally consistent with lack of knowledge or neglect as it is with assent;
- (g) Plaintiffs are not required to exhaust their administrative remedies as the administrative remedies are clearly inadequate.

49. In the interim, following the Tentative Decision and Order issued by Administrative Law Judge Dorothea A. Baker in AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3, the Secretary of Agriculture on April 8, 1988 and April 18, 1988 published, for the first time in the Federal Register, regulations proposing to implement the "well-matured" maturity regula-

tions to be determined by the use of color-chips, size elimination regulations, and proposing to allow the Federal or Federal-State Inspection Service to grant variances from the color chip standards to reflect changes in crop or weather conditions which would make the color determination an inappropriate measure of "well-matured." These proposed regulations were intended to apply to nectarines, plums and peaches.

50. Following the issuance of the 1988 proposed maturity regulations, Plaintiffs, on June 6, 1988 filed their second Administrative Petition with the Department of Agriculture pursuant to Title 7, U.S.C. §608c(15) (A). Thereafter, on July 31 1989, Plaintiffs filed an Amended 7 U.S.C. §608c(15) (A) Petition with the Department of Agriculture contesting the validity of the 1988 proposed "well-matured" maturity regulations on nectarines, plums and peaches. Plaintiffs' Petition also contested: The maturity regulations on peaches for the 1980 through 1987 harvest seasons; the 1988 size elimination regulations issued as interim final rules by the Secretary of Agriculture in May, 1988; and, the assessments levied on Plaintiffs by the Secretary of Agriculture from 1980 through the present.

51. Pursuant to the Rules of Practice Governing Administrative Petition Proceedings, Plaintiffs, in conjunction with filing their second 7 U.S.C. §608c(15) (A) Petition, requested interim relief, pursuant to 7 C.F.R. §900.70, claiming that Plaintiffs would again lose a substantial amount of fruit and money if interim relief was not granted pending the outcome of the administrative petition proceeding. The Department of Agriculture opposed the motion and the Secretary, through his Judicial Officer,

denied the motion claiming that administrative interim relief is never available, within the provisions of the Act.

52. Following the conclusion of the second administrative petition hearing, conducted in October 1988, January and February 1989, and following full briefing on the merits, the trial judge, Administrative Law Judge Dorothea A. Baker based on the testimony received through the witnesses, the exhibits admitted into evidence and the applicable law, granted Plaintiffs' Petition (AMA Docket Nos. F&V 916-3 and 917-4). Therein, Administrative Law Judge Baker specifically found:

- (a) The rulemaking record for the 1988 and 1989 harvest seasons failed to set forth any substantial evidence to reasonably justify the color standards and/or "spring" tests assigned by variety for nectarines, plums and peaches;
- (b) The specific color standards and "spring" requirements assigned to each variety of nectarine, plum and peach, although published in the Federal Register, were not established on any substantial basis and purpose statement by the Secretary of Agriculture;
- (c) The color chips and "spring" tests used to define "well-matured" nectarines, plums and peaches, are arbitrary and capricious in that they bear no rational relationship whatsoever to the internal maturity of the fruit;
- (d) The techniques used in determining the well-matured requirements for nectarines, plums and peaches, through the use of specific color chips and specific "spring" tests, are artifi-

- cial determinators which may not reflect whether the fruit is "well-matured" or not;
- (e) Nectarines, plums and peaches meeting the so-called "well-matured" color chips and/or "spring" standards may in fact be internally immature; and on the other hand, nectarines, plums and peaches failing said color chips and/or "spring" tests may bear the internal meat which is in fact "well-matured;"
 - (f) The procedure established to grant or deny a variance from the maturity standards, and the review process established by the Secretary of Agriculture, fail to provide any meaningful review and fails to provide any neutral impartial review mechanism by which an assigned color chip or "spring" test standard may be appropriately modified;
 - (g) The "well-matured" maturity standards constitute illegal volume control rather than quality control;
 - (h) The internal maturity of nectarines, plums and peaches can be determined accurately and objectively by different types of tests other than through the application of color chips and/or "spring" tests. Accordingly, said color chip application is arbitrary and capricious. The surface color of nectarines, plums and peaches, and the "spring" of plums, does not objectively nor rationally determine whether or not those varieties are of good consumer quality and good marketable quality;
 - (i) The color chips and "spring" tests were implemented and imposed prior to the conducting of any meaningful scientific studies whatsoever. What few studies were con-

- ducted demonstrate that the color chips and "spring" tests imposed by the Secretary are capricious and arbitrary in that they do not bear any rational relationship whatsoever to the internal maturity of nectarines, plums and peaches;
- (j) The color chips being employed for the 1989 harvest season were not even in existence and are different from the color chips which were in existence, and not part of the rule-making record, at the time the Secretary promulgated the color chip assignments for the 1988 and 1989 harvest seasons. Said differences are substantial, effectuating economic loss to Petitioners. There is no rational relationship between the two different sets of color chips presently being employed by the industry;
 - (k) The use of color chips to define "well-matured," without consideration of more objective maturity testing devices, is applied discriminatorily for the purpose of discriminating against nectarines, plums and peaches which have less red color. Said color standards favor nectarines, plums and peaches, particularly the newer varieties, that are almost red, because the latter varieties reach and exceed the specific color standards prior to ever becoming truly "well-matured;"
 - (l) The rule-making record is devoid of any substantial evidence adequately defining the definition of "well-matured;"
 - (m) Whether or not fruit is "well-matured" does not affect its taste. Nectarines, plums and peaches which are "well-matured," may have

less taste and less consumer appeal than fruit which is not "well-matured" but merely U.S. No. 1. The rule-making record with respect to the "well-matured" standard is devoid of any meaningful evidence whatsoever regarding taste tests;

- (n) Nectarines, plums and peaches, although grown in the majority of the states of the United States, are only subject to the "well-matured" maturity standards when grown in the state of California;
- (o) The elimination of smaller-sized nectarines and peaches is arbitrary and capricious and results in volume control. Further, the rule-making record fails to contain any credible substantial evidence to support the Secretary's finding that smaller-sized fruit is rejected by the consumer as lacking quality, taste or nutritional value;
- (p) The enforcement of color chips and "spring" tests as constituting the definition of "well-matured" fruit, as well as the size elimination of nectarines and peaches, are arbitrary and capricious actions and constitute an illegal taking without just compensation for Petitioners' fruit and denies Petitioners equal protection among handlers of the same varieties in other states;
- (q) Although statutorily, the Nectarine, Plum and Peach Committees operate pursuant to appointment and delegation from the Secretary of Agriculture and with his approval, as a practical matter, there seems to be no active supervision or meaningful oversight by the United States Department of Agriculture

over said Committees' decisions with respect to size elimination, maturity standards, color chips, "spring" tests and assessment fund expenditures;

- (r) From the 1980 harvest season, through and including the present, Petitioners have been subjected to California Tree Fruit Agreement assessments. Said assessments are unlawful and have been imposed upon Petitioners in a manner not in accordance with law. For the reasons set forth within the Wileman-I Decision, CTFA is an unlawful organization, with respect to the marketing orders, which does not have the right to assess nor collect any assessments whatsoever. Nor does CTFA have the authority to require SPI inspections;
- (s) The CTFA "generic" advertising program, and other programs associated therewith, lack constitutional adherence. CTFA and the Nectarine, Plum and Peach Committees, for which CTFA purports to collect said assessments, owe Petitioners substantially more in monetary damages for the aforementioned unlawful takings of their fruit, than the assessment monies at issue herein. But the amount of any recovery in this proceeding depends upon evidence to be adduced at a future hearing for that purpose in the event Petitioners prevail throughout this proceeding;
- (t) The Secretary's position with respect to CTFA has been inconsistent. In this proceeding the Secretary contends that CTFA is a lawful entity. However, in Federal District

Court Case No. CV-F-87-392-EDP, Respondent contended that, among other things, the California Tree Fruit Agreement is not a legal entity, which the Honorable District Court Judge Edward Dean Price found after his review of U.S. Attorney Carl Blackstone's Declaration in this regard filed July 21, 1987;

- (u) The forced imposition of "generic" advertising assessments is violative of Petitioners' constitutional rights protected by the First Amendment. The Constitution of the United States and the Amendments thereto protect the rights of free association and the right to speak freely and the right to refrain from speaking at all.
- (v) The evidence is uncontradicted herein, that these Petitioners, as well as others, have been under a compulsion to be forced to participate administratively and financially in the promotion of a cause and a message with which they disagree on ideological, moral, economic and commercial bases. This is incompatible with the principals protected by the First Amendment. The regulations as set out in 7 C.F.R. §916.45 and 917.39 are a violation of Wileman/Kash's First Amendment rights regarding freedom of speech and association to the extent that such regulations force participation in a "generic" advertising program.
- (w) The evidence herein fails to establish any legitimate governmental interest for taxing handlers a per carton fee to support a "generic" advertising program with the goals

of increasing consumer consumption of nectarines, plums and peaches. The government has no legitimate interest in advocating consumers' purchase of nectarines, plums and peaches grown in California as opposed to consumers' purchases of nectarines, plums and peaches grown in any other state, or as opposed to the consumption of any other food products whatsoever;

- (x) Petitioners and other tree fruit handlers are unfairly burdened because the forced "generic" advertising assessments are forced payments, and are a taking only from them and not from all others who participate in and profit from the tree fruit industry;
- (y) Only California nectarine, plum and peach handlers are subject to any federal mandatory assessments for "generic" advertising. Other states' handlers of nectarines, plums and peaches are not subjected to such assessments, nor are any retailers, wholesalers, brokers, jobbers or any other people involved in the economic chain dealing with nectarines, plums and peaches assessed any "generic" advertising tax whatsoever;
- (z) Petitioners, as a condition of their being handlers of California Tree Fruit, are forced to expend their money, not to foster the legitimate purposes of the Agriculture Marketing Agreement Act, nor to improve their own business position, but rather to finance an advertising program which is contrary to their personal, professional, ideologic, philosophic and commercial beliefs;

- (aa) Petitioners derive no benefit from the forced "generic" advertising programs. In fact, Petitioners are damaged by the forced "generic" advertising assessments (or tax) in that the funds taken from them would otherwise have been used to promote their own label over the label of their competitors in California and competitors in other states;
- (bb) The forced generic advertising assessments imposed on Petitioners violates their constitutional right of freedom of speech and association, both as individuals and in the commercial setting in that CTFA's "generic" advertising programs compel Petitioners to provide financial support for the advancement of economic, ideological and/or commercial beliefs and programs to which Petitioners disagree;
- (cc) The forced taking of money from Petitioners for "generic" advertising programs to which they ideologically, philosophically, economically and commercially find unacceptable violates the protections afforded Petitioners by the First and Fifth Amendments;
- (dd) The Agricultural Marketing Agreement Act, the Marketing Orders and various United States Department of Agriculture guidelines strictly regulate how assessment monies mandatorily collected from handlers may be spent by commodity committees and further strictly regulate the subjects upon which such expenditures may be made. In an admitted effort to avoid such proscriptions, CTFA has siphoned off assessment monies and illegally transferred them to a purported

California non-profit corporation known as the Tree Fruit Reserve.

The Tree Fruit Reserve, acting with an identical board that controls CTFA, then has expended and continues to expend those funds in manners and upon projects which the Secretary of Agriculture's guidelines strictly prohibit assessment monies from being expended upon.

... The Tree Fruit Reserve was established and admittedly continues to operate, in a manner to avoid proscriptions, limitations and restrictions placed upon the Secretary of Agriculture, the commodity committees and their agents, by the Agricultural Marketing Agreement Act.

The purpose of the Tree Fruit Reserve is to engage in acts which are illegal for the Secretary of Agriculture to engage in. The collection and expenditure of assets are subject to the jurisdiction, revision and approval of the Secretary of Agriculture. The Tree Fruit Reserve has been, and is being, used to divert assessment monies, resulting in higher handler assessments than would otherwise be required to achieve the legal and legitimate objectives of the Agricultural Marketing Agreement Act and the Order.

Profits generated by the Tree Fruit Reserve from handler assessment monies are used to promote special interests of the various commodity committeemen. The appointment of members to committees of the various commodities by the Secretary of Agriculture is a high calling. It is one of

trust and responsibility, and the duties and responsibilities of committee members and committee chairmen may not be viewed lightly, because the Secretary of Agriculture has entrusted to such persons the lofty position they occupy and he expects their authority to be exercised in a manner reflective of the Secretary's own responsibilities and judgement.

This was not done here, because it was illegal for the members of the Nectarine, Plum and Peach Committees to spend handler assessment monies through the Tree Fruit Reserve for activities which transcend questionable to the illegal. Such "schemes" and "shams," acting under the color of law, should not be tolerated to avoid the Secretary's regulations and Congress' intent in establishing the Agricultural Marketing Agreement Act, nor should uncertainty as to the capacity in which a person acts at any given time become a guessing game. The Chairmen of the respective Nectarine, Plum and Peach Committees and the Chairman of the Control Committee are automatically on the Board of Directors of the Tree Fruit Reserve and are one and the same.

There is an intertwinement between said CTFA and the Tree Fruit Reserve. There is a commonality, a sameness, attached to their meetings, their minutes, as well as their use of the same accounting firm. Discussions relating to the application of the regulations and Order provisions and the operation of each entity are being mutually

discussed within the framework of these common organizations.

When a Chairman of one of the Nectarine, Plum and Peach Committees speaks, how is one to know if he is speaking, and if his actions are reflective of the high position which he holds, by virtue of the Secretary of Agriculture's appointment to the same, or must one wonder whether or not this Committee Chairman's advice and guidance or actions are reflective of being a member of and/or a director of the Tree Fruit Reserve, which later organization can and does engage in activities which admittedly are illegal to the Commodity Committees.

This duality of purpose provides fertile ground for such persons to engage in tactics to restrain their competitors and at the same time, increase production and marketing of their own produce or that of their friends. Little thought has been given to "conflict of interest" and under the present system, any question arising concerning same would be referred to Washington.

The Commodity Committee members including their respective Chairmen, may not directly or by subterfuge in a dual capacity, violate the laws and then claim exemption from such liability. Some growers and handlers, particularly the smaller ones, may not be represented at all or, if represented, very poorly, and their property rights would not be protected when the committee members should, on behalf of the Secretary's trusted position as a committee member, subject to

the Secretary's supervision, delegation and approval, then don the hat of a member of the Board of Directors of the Tree Fruit Reserve, which, in the latter capacity, said member's interests may be, and often are, contrary to the interests of others in the same business;

- (ee) The commodity committee members had no official duty to be part of and/or to condone a little known, if at all, alleged private non-profit corporation, the operations and actions of which were regarded as none of the United States Department of Agriculture's business and which sought to be separated from the Department of Agriculture by achieving a cosmetic facade to create the illusion of separateness. Under such circumstances, the committee members do not have the Secretary's approval because the Secretary cannot and will not approve of illegal acts. Hiding from view within the confines of the Tree Fruit Reserve does not alter the responsibilities and duties of the Secretary of Agriculture, nor his committee members and chairmen, whom he appoints;
- (ff) CTFA acting through its alter-ego, Tree Fruit Reserve, has unlawfully spent assessments on lobbying;
- (gg) CTFA, acting through its alter-ego, Tree Fruit Reserve, has unlawfully spent assessments on retaining attorneys to represent private individuals in direct conflict with the interests of Petitioners;
- (hh) The Secretary of Agriculture's annual imposition of "generic" advertising and expense

assessments from 1980 to the present are rulemaking actions which did not comply with the notice and comment requirements of the Administrative Procedure Act;

- (ii) The Secretary has never provided a "substantial basis and purpose statement" justifying the assessment rates imposed on handlers of nectarines, plums and peaches for the harvest seasons 1980 through the present;
- (jj) The Secretary has consistently failed to comply with the notice and comment provisions of the Administrative Procedure Act in regard to the imposition of expense and advertising assessments for the years 1980 through 1987. Additionally, the imposition of assessments for the 1988 and subsequent harvest seasons were in violation of the notice and comment requirements of the Administrative Procedure Act;
- (kk) The imposition of the "well-maturity" standard for the 1988 and subsequent harvest seasons was in violation of the notice and comment requirements of the Administrative Procedure Act;
- (ll) The Secretary's imposition of size elimination regulations with respect to nectarines and peaches, was in violation of the notice and comment requirements of the Administrative Procedure Act;
- (mm) From 1980 through the present, the Secretary of Agriculture has retroactively applied and retroactively adopted advertising and expense assessments.
- (nn) The commodity committees, CTFA and their alter-ego Tree Fruit Reserve, have intention-

ally failed to comply with the "Sunshine" Act and the Federal Advisory

- (oo) With respect to Nectarine, Plum and Peach Marketing Orders, the administrative process does not provide an effective, timely and adequate remedy. The record fails to reveal the source from which monetary relief would be forthcoming to Petitioners in the event Petitioners were to prevail and be entitled to the same.

Therefore, Judicial Notice and Official Notice is taken of the fact that by Order dated July 6, 1989, in Case No. CV-F-88-568-EDP, the Honorable Federal District Court Judge Edward Dean Price established an attorney/client trust account into which Petitioners herein have placed, and are continuing to place, their contested advertising and expense assessments. I concur and agree with such trust fund establishment and its maintenance by Judge Price, in that such trust fund creates a pool of money which may be awarded to Petitioners in the event they ultimately prevail in this proceeding;

- (pp) Petitioners have suffered economic damages and losses as a direct result of unlawful activities of the Respondent, CTFA, the Commodity Committees and Tree Fruit Reserve;
- (qq) Petitioners are entitled to an award of damages as well as an award of legal fee reimbursement as a result of the denial of their due process rights which Petitioners have sustained as a result of the illegality of the actions taken with respect to Marketing Orders 916 and 10 917. The extent to which

Petitioners may recover in this regard is a matter over which the Judicial Officer apparently has jurisdiction.

Therefore, for all the foregoing reasons and for such further and additional reasons set forth in the final decision, it is found that the Peach, Plum and Nectarine Marketing Orders are not in accordance with law as applied to these Petitioners and that as a result of said illegal enforcement of those Marketing Orders, the Petitioners have been severely damaged.

Therefore, Petitioners are entitled to damages for injuries which they have sustained as a direct result of such illegal activities and Petitioners are entitled to full legal fee reimbursement when they have complied with the procedures set forth in the Equal Access To Justice Act as well as the pertinent provisions of the Administrative Procedure Act. The amount of said damages and legal fee reimbursement is to be determined at a subsequent hearing established for that purpose [See Exhibit "E" to First Amended Complaint, filed herewith].

53. Having again suffered an adverse ruling before the trial judge, counsel for the Secretary of Agriculture appealed Administrative Law Judge Baker's second Decision and Order (AMA Docket Nos. F&V 916-3 and 917-4) to the Secretary. Again, the Secretary of Agriculture designated Donald A. Campbell as the Secretary's designee to hear the appeal brought by the Secretary's counsel. Counsel for the Secretary filed the Secretary's appeal on July 31, 1991.

54. Thereafter, as set forth in Paragraph 43, *supra*, the Judicial Officer at the request of USDA, consolidated both matters (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3 and AMA Docket Nos. F&V 916-3 and 917-4), removed Administrative Law Judge Baker from her duties in writing the Decision regarding Plaintiffs' second Administrative Petition. Concerned that the Judicial Officer's action in removing Administrative Law Judge Baker was a denial of due process, counsel for the Secretary of Agriculture later moved to reinstate Administrative Law Judge Baker as the individual assigned to write the initial Decision. The Judicial Officer granted the Secretary's motion.

55. On or about May 24, 1991, the Trial Judge, Dorothea A. Baker, issued her 369 page Decision and Order, which included the Findings of Fact and Conclusions of Law set forth in paragraph 52, *supra* [See Exhibit "F" to First Amended Complaint filed herewith for a copy of Administrative Law Judge Baker's Decision and Order].

56. As a result of the Ninth Circuit's position in *Wileman Bros. and Elliott, Inc., et al. v. Yuetter, et al.*, *supra*, and the subsequent Order issued by the Honorable Oliver 12 W. Wanger in connection with expediting the instant First Amended Complaint, the Judicial Officer issued his Final Decision and Order on an "expedited" basis, on September 30, 1991. The Secretary's Final Decision and Order reversed Administrative Law Judge Baker's Findings of Fact and Conclusions of Law and dismissed Plaintiffs Petition.

57. The Secretary's Final Decision and Order (filed herewith as Exhibit "G" to the First Amended Complaint) found that, despite Administrative Law Judge Baker's conclusions to the contrary, Plaintiffs

were not entitled- to an award of monetary damages; Plaintiffs were foreclosed from raising a substantial number of issues based on the Judicial Officer's Decision and Order regarding Plaintiffs' first Administrative Petition (AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3) contending *res judicata* applied as to those issues; the promotional and advertising programs present no impingement on Plaintiff's First Amendment rights and are thus constitutional; the advertising and promotional programs do not violate 2 Plaintiffs' Fifth Amendment rights and are, thus, constitutional; Congress has not unlawfully delegated its taxing power to the Secretary of Agriculture; no violations of the Sunshine Act, the Brown Act or the Federal Advisory Committee Act exist; the relationship between the Tree Fruit Reserve and the Marketing Order Programs is in accordance with law; the regulatory requirements necessary to be complied with, pursuant to the Administrative Procedure Act, were satisfied; the imposition of the "well-matured" maturity standards and "color standards" were not arbitrary, capricious nor have they been applied discriminatorily; the 1988 size elimination regulations were not arbitrary and capricious and were promulgated in accordance with the APA.

FIRST CAUSE OF ACTION

58. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 57 of this First Amended Complaint.

59. The Secretary's Final Decisions and Orders, issued through his Judicial Officer, Donald A.

Campbell, overturning the Decisions and Orders issued by the trial Judge, Administrative Law Judge Dorothea A. Baker, in AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3 and/or AMA Docket Nos. F&V 916-3 and 917-4, are unsupported by substantial evidence, contrary to the weight of the credible evidence introduced at the hearing, factually unsupported, arbitrary and capricious and contrary to law. Further, the Secretary's Decisions and Orders, as Issued by his Judicial Officer, are inconsistent with the ruling of the 9th Circuit Court of Appeals issued in *Wileman Bros. & Elliott, Inc., et al. v. LeRoy Giannini, et al., supra*.

SECOND CAUSE OF ACTION

60. Plaintiffs' repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 59 of this First Amended Complaint.

61. The course and conduct and the activities of the members of the Nectarine, Plum and Peach Commodity Committees and their agents and employees who unlawfully regulate and inspect said nectarines, plums and peaches on behalf of the Nectarine, Plum and Peach Committees, under color of federal law, have injured Plaintiffs in that they have deprived and continue to deprive Plaintiffs of their constitutional rights to due process of law guaranteed under the Fifth Amendment of the Constitution as the conduct of the Secretary and his agents and employees, including the Federal-State Inspection Service, the members of the Nectarine, Plum and Peach Committees and their agents and employees amounts to a

taking of said nectarines, plums and peaches without due process of law.

62. Plaintiffs have been injured in an amount equal to the fair market value of the fruit unlawfully taken and/or destroyed as a result of being forced to comply with the "well-matured" maturity standards unlawfully established and enforced by the Nectarine, Plum and Peach Committees; an amount in excess of \$5,000,000.00.

THIRD CAUSE OF ACTION

63. Plaintiffs repeat and reallege, and Incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 62 of this First Amended Complaint.

64. The conduct of the Secretary and his agents and employees, including but not limited to the Agricultural Marketing Service personnel, the members of the Nectarine, Plum and Peach Committees, the California Tree Fruit Agreement personnel, the Federal-State Inspectors, whose conduct is undertaken under color of federal law, is violative of the Administrative Procedure Act, Title 5, U.S.C. §551, et seq. The Administrative Procedure Act was not followed with respect to the issuance and enforcement of CTFA "regulations." The Secretary and his agents and employees have unlawfully applied the CTFA "regulations" to Plaintiffs as though said "regulations" have the force and effect of federal law even though the Administrative Procedure Act had not been complied with in establishing said "regulations."

65. Plaintiffs have sustained substantial damages as a result of the unlawful implementation of the

"well-matured" maturity regulations and the unlawful implementation and enforcement of the "color standards" applied to the picking, packing and shipping of Plaintiffs' nectarines, plums and peaches.

66. Plaintiffs have been injured in an amount equal to the fair market value of the fruit unlawfully taken and/or destroyed as a result of being forced to comply with the "well-matured" maturity standard unlawfully established and enforced by the Nectarine, Plum and Peach Committees; an amount in excess of \$5,000,000.00.

FOURTH CAUSE OF ACTION

67. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 66 of this First Amended Complaint.

68. Assessments are levied each harvest season by the California Tree Fruit Agreement pursuant to Marketing Order regulations, 7 C.F.R. §§916.1, et seq. and 917.1, et seq., to cover the expenses which may be incurred during each fiscal year by the Nectarine, Plum and Peach Committees (7 C.F.R. §§916.41 and 917.37). Said assessments would also include the cost of marketing research and development (advertising) as approved by the Secretary (7 C.F.R. §§ 916.45 and 917.39).

69. The assessments levied and collected by the Nectarine, Plum and Peach Commodity Committees, and their employees, the California Tree Fruit Agreement, under color of federal law, constitute an unlawful taking of said assessment monies without due process of law and are a denial of equal protection, in violation of the Fifth Amendment of the United

States Constitution, in that said assessments are used to pay the expenses and operating costs of the Nectarine, Plum and Peach Commodity Committees, as well as the salaries and operating costs of the California Tree Fruit Agreement personnel and the Federal-State Inspection Service personnel who enforce said unlawful regulations.

70. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)].

FIFTH CAUSE OF ACTION

71. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 70 of this First Amended Complaint.

72. Each harvest season, from 1980 through and including the 1987 harvest season, the Secretary failed to issue proposed rules, providing notice and comment, regarding the advertising and expense assessments ordered to be paid to the Nectarine, Plum and Peach Commodity Committees. Instead, the Secretary, toward the end of each harvest season, would issue a final rule "rubber-stamping" the advertising and expense assessments requested by the respective Committees. Each year, the harvest season would be essentially over (i.e., all Plaintiffs' nectarines, plums and peaches would have been

picked, packed and shipped) prior to the Secretary issuing, without opportunity for notice and comment, his budget for that particular harvest season. The employees of the California Tree Fruit Agreement would then bill Plaintiffs for their pro rata share of the expenses incurred by the Nectarine, Plum and Peach Commodity Committees, and their employees, the CTFA personnel, to include advertising expenses, after the conclusion of that harvest season.

73. For each harvest season at issue herein, 1980 through and including the present, the fiscal year means the twelve (12) month period beginning on March 1, of one year and ending on the last day of February of the following year (7 C.F.R. §§916.7 and 917.9). The handling of nectarines, plums and peaches begins every year during the month of May. The final rules establishing expense and advertising assessments rates for each harvest season at issue herein were generally issued in the middle of August each season. With the exception that in 1985 the final rule setting forth the assessment rate was July 12; in 1986, the final rule was issued on October 17; in 1988 the final rule was issued July 19; and, in 1990, the final rule was issued on July 20. Neither the AMAA nor Marketing Orders 916 and 917 contain any express provision for retroactive rulemaking. Under the Administrative Procedure Act 23 (Title 5, U.S.C. §551, et seq.), notice of the Secretary's actions occurs at the time of publication in the Federal Register. Plaintiffs were unlawfully required to pay, retroactively, expense and advertising assessments levied and collected by the California Tree Fruit Agreement for nectarines, plums and peaches picked, packed and shipped prior to the promulgation and issuance of the Secretary's assessment regulations.

74. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)].

SIXTH CAUSE OF ACTION

75. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 74 of this First Amended Complaint.

76. With respect to the imposition of expense and advertising assessments, for the harvest seasons 1980 through and including the present, the Secretary failed to engage in reasoned decisionmaking, failed to set forth a substantial basis and purpose statement and failed to provide for notice and comment with respect to: (i) whether or not to institute a "generic" advertising program; (ii) the relative costs and benefits of instituting a "generic" advertising program; (iii) in what manner to advertise ("generic" or brand name specific); (iv) whether credits should be allowed, for mandatory "generic" advertising assessments, to growers and handlers for their direct expenditures for their own specific brand name advertising; (v) what format should be adopted for the advertising of various tree fruit commodities; (vi) what monetary limits should be placed on the Nectarine, Plum and Peach Commodity Committees as to the cost of a "generic" advertising program—all

in violation of the Administrative Procedure Act (Title 5, U.S.C. §551, et seq.).

77. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)].

SEVENTH CAUSE OF ACTION

78. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 77 of this First Amended Complaint.

79. Each harvest season, from 1980 through and including the present, the Secretary has been granted unfettered discretion to set the assessment rates at any level he deems "reasonable." Neither the relevant provisions of the AMAA nor the regulations established by the Secretary pursuant to the Marketing Orders, contain guidelines or restrictions limiting the Secretary's power in establishing and enforcing assessment rates. Without guidelines or restrictions being imposed on the Secretary with respect to Congress' delegation 28 of legislative authority to the Secretary of Agriculture, such 1 delegation is unlawful and any assessments established by the Secretary are likewise unlawful.

80. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Plum and Peach Commodity Committees, as collected by the California Tree Fruit Agreement, from 1980 through

and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court Order (CV-F-88-568 EDP)]

EIGHTH CAUSE OF ACTION

83. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth herein verbatim, each and every allegation contained in Paragraphs 1 through 82 of this First Amended Complaint.

84. Assessments are levied each harvest season by the California Tree Fruit Agreement, pursuant to Marketing Order Regulations, 7 C.F.R. §§916.1, et seq. and 917.1, et seq., to pay for promotion, advertising, research and other items reflecting the ideological, economic, philosophical and commercial viewpoints of Plaintiffs' competitors to which Plaintiffs do not subscribe. Plaintiffs are forced to associate with, and speak to, views which are repugnant to Plaintiffs' ideological, philosophical, economic and commercial viewpoints, all in violation of Plaintiffs constitutional rights protected by the First Amendment of the United States Constitution.

85. Plaintiffs have been injured in the amount of the assessments paid to the Nectarine, Peach and Plum Committees, as collected by the California Tree Fruit Agreement, from 1980 through and including the present; an amount in excess of \$1,000,000.00 [Plaintiffs' 1987 through 1991 assessments are currently held in a trust account pursuant to Federal District Court order (CV-F-88-568 EDP)].

NINTH CAUSE OF ACTION

86. Plaintiffs repeat and reallege, and incorporate herein by reference, the same as though set forth

herein verbatim, each and every allegation contained in Paragraphs 1 through 85 of this First Amended Complaint.

87. The conduct of the Nectarine, Plum and Peach Committee members, the agents of the Secretary of Agriculture, and the California Tree Fruit Agreement personnel, in establishing and maintaining a "private non-profit corporation, known as the Tree Fruit Reserve to be used to circumvent the proscriptions and restrictions placed on these individuals in their capacities as agents of the Secretary of Agriculture is violative of both federal and state antitrust laws. In their capacities as members of, directors of and/or agents of The Tree Fruit Reserve Corporation, the above-referenced individuals have manipulated Marketing Orders 916 and 917 for their own benefit, in violation of the Agricultural Marketing Agreement Act.

88. Assessments levied and collected from Plaintiffs and others within the tree fruit industry have been diverted to the Tree Fruit Reserve Corporation to be used for purposes not otherwise authorized by the Marketing Orders and/or the Agricultural Marketing Agreement Act.

89. Plaintiffs have been injured in an amount equal to the fair market value of the fruit unlawfully taken and/or destroyed, and the assessments stolen, as a result of the actions and regulations imposed on Plaintiffs by those associated with the Tree Fruit Reserve Corporation; an amount in excess of 5,000,000.00.

PRAYER

WHEREFORE, Plaintiffs respectfully request this Court to review de novo the Secretary's Final

Decision and Order as issued by his designee, Judicial Officer Campbell, pursuant to 15 U.S.C. §608c(15) (B) and 5 U.S.C. §706. Petitioners respectfully request this Court:

(a) To issue an Order that the Secretary's Final 18 Decisions And Orders of July 9, 1990 and September 30, 1991 are not in accordance with law in that they are:

- (1) Unsupported by substantial evidence;
- (2) Arbitrary and capricious;
- (3) Contrary to the weight of the credible evidence introduced at the hearing; and,
- (4) Factually unsupported.

(b) To issue a declaration that:

(1) Those purported Nectarine and Plum Marketing

Order regulations, from 1980 through and including the present, establishing and enforcing the "well-matured" maturity standard and the "color standard" are illegal and of no force and effect;

(2) The assessments levied against Plaintiffs, from 1980 through and including the present are unlawful;

(3) The California Tree Fruit Agreement and its employees are a non-entity with no delegated authority to impose and/or enforce Marketing Order regulations, nor, to assess, levy or collect assessments from Plaintiffs;

(4) With respect to the Nectarine, Plum and Peach Marketing Orders, the administrative process does not provide an effective, timely or adequate remedy. Unless and until the Secretary establishes procedures to provide both pre-taking and post-taking monetary relief, any litigation initiated by and on behalf of these Plaintiffs with respect to the Nectarine and Plum Marketing Orders shall not necessitate their "exhausting their administrative remedies" as said remedies do not exist.

(c) To award Plaintiffs damages in an amount equal to the fair market value of all fruit unlawfully taken and/or destroyed as a result of being forced to comply with the above-mentioned invalidly and unlawfully imposed Nectarine, Plum and Peach Marketing Order regulations. Said damages, exceeding \$5,000,000.00, to be proven at a subsequent hearing conducted for that purpose;

(d) To award Plaintiffs reimbursement of their assessments in an amount equal to all assessments levied and collected against Plaintiffs from 1980 through and including the present; said assessments exceeding \$1,000,000.00, to be proven at a hearing conducted for that purpose. Plaintiffs' assessment reimbursement to be paid through the reserve funds maintained by the Nectarine, Plum and Peach Commodity Committees through the collection of assessments by the Nectarine, Plum and Peach Commodity Committees in future harvest-seasons and through the reserve funds maintained by the Tree Fruit Reserve Corporation.

(e) To remove and recuse the Department of Agriculture's Judicial Officer, Donald A. Campbell,

from any further involvement or review of the instant matter and/or any other Administrative Petitions brought by Plaintiffs, to include AMA Docket Nos. F&V 916-1, 916-2, 917-2 and 917-3 and AMA Docket Nos. F&V 916-3 and 917-4;

(f) To remand these proceedings to the Secretary of Agriculture with instructions to grant the relief sought by Plaintiffs in their Petitions and/or Ordered by this Court;

(g) To award Plaintiffs their attorney's fees and costs incurred herein, pursuant to the Equal Access To Justice Act (28 U.S.C. §2412, et seq. and 5 U.S.C. §504); and,

(h) To award Plaintiffs such other and further relief to which Plaintiffs may be entitled.

DATED: October 7, 1991

THE LAW FIRM OF THOMAS E. CAMPAGNE
A Professional Corporation

By /s/ THOMAS E. CAMPAGNE
THOMAS E. CAMPAGNE

By /s/ CLIFFORD C. KEMPER
CLIFFORD C. KEMPER
Attorneys for Plaintiffs

[verification and proof of service omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-87-392 OWW

WILEMAN BROS. & ELLIOTT, INC., A CALIFORNIA
CORPORATION; FRANK T. ELLIOTT, JR. D/B/A ELLIOTT
FARMS, A SOLE PROPRIETORSHIP, AND KASH, INC., A
CALIFORNIA CORPORATION, PLAINTIFFS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE;
RICHARD LYNG, FORMER SECRETARY OF
AGRICULTURE; THE UNITED STATES DEPARTMENT OF
AGRICULTURE; THE CONTROL COMMITTEE OF THE
CALIFORNIA TREE FRUIT AGREEMENT; THE NECTARINE
ADMINISTRATION COMMITTEE, DEFENDANTS

No. CV-F-88-568 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILEMAN BROS. AND ELLIOTT, INC., A CALIFORNIA
CORPORATION; AND, KASH, INC., A CALIFORNIA
CORPORATION, DEFENDANTS

No. CV-F-90-088 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILEMAN BROS. AND ELLIOTT, INC., A CALIFORNIA
CORPORATION; AND, KASH, INC., A CALIFORNIA
CORPORATION, DEFENDANTS

No. CV-F-90-473 OWW

WILEMAN BROS. & ELLIOTT, INC., A CALIFORNIA
CORPORATION; FRANK T. ELLIOTT, JR. D/B/A ELLIOTT
FARMS, A SOLE PROPRIETORSHIP, AND KASH, INC., A
CALIFORNIA CORPORATION, PLAINTIFFS

v.

CLAYTON YUETTER, SECRETARY OF
AGRICULTURE, DEFENDANT

No. CV-F-91-318 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

WILEMAN BROS. & ELLIOTT, INC., DEFENDANT

No. CV-F-91-319 OWW

UNITED STATES OF AMERICA, PLAINTIFF

v.

KASH, INC., DEFENDANT

[Filed: Aug. 2, 1991]

**ORDER CONSOLIDATING ACTIONS AND
ESTABLISHING SCHEDULE FOR HEARING
OF CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Upon stipulation of the parties made in open court August 1, 1991, to serve efficiency and to enable the expedition of these related cases and in the interests

of justice because the issues of fact and law applicable to each of these cases relate to common questions of interpretation, application, validity, and enforcement of certain agricultural marketing orders, specifically, 7 C.F.R. §916.356;

IT IS HEREBY ORDERED that these actions are consolidated for all purposes.

FURTHER ORDERED that pursuant to the Order of this Court Compelling Agency Action in pending administrative appeals that are the subject of Cases Nos. 87-392 and 90-473, and based on representations from the Assistant United States Attorney that final administrative action can be completed by October 2, 1991, the following schedule shall govern further proceedings in these two consolidated cases:

Plaintiffs in said cases, Wileman Bros. & Elliott, Inc., and Kash, Inc., shall file their amended complaint under 7 U.S.C. §608(c)(15)(B) on or before October 7, 1991, and shall serve defendants by express mail or courier to effect service by 5:00 p.m. on October 8, 1991. All material allegations of the amended complaint shall be deemed denied by the Defendants without the necessity of further pleading.

The parties shall have through and including November 8, 1991, to simultaneously file cross-motions for summary judgment and motions for such other relief, if any, as are deemed appropriate. Such motions shall be served by personal delivery the day filed.

Opposition to motions shall be simultaneously filed on or before November 29, 1991. Such opposition shall be served by personal delivery the day filed.

Simultaneous cross-replies shall be filed by December 10, 1991. Such cross-replies shall be served by personal delivery the day filed.

FURTHER ORDERED that any motions so filed in consolidated Cases No. 87-392 and 90-473 shall be heard January 17, 1992, at the hour of 9:00 a.m. in Department 2 of this Court.

FURTHER ORDERED that the parties' attorneys are directed to meet and confer respecting agreement to a form of order to be directed to the appropriate representative of the Secretary of Agriculture to enable preparation and filing of the administrative record with this Court by October 7, 1991. Such order accompanied by a stipulation-of-counsel agreeing to the form of the order shall be lodged with the court by August 15, 1991.

DATED: August 2, 1991.

/s/ OLIVER W. WANG
OLIVER W. WANG
United States District
Judge

wileman.pl

1980-1981 CALIFORNIA STONE FRUIT BUDGETS

Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

I hand you herewith the following documents:

1. Proposed Allocation of Joint Expenses Among Programs for 1980-1981 Compared With Prior Year.
2. Stone Fruit Budgets with attachments -
Peach Commodity Committee -
Plum Commodity Committee
Nectarine Administrative Committee
3. Eight Research Proposals.
4. Two Ripening Bowl Financial Reports, one applicable to the fiscal period which ended February 29, 1980, and one recapping sales and expenses during the past five years.

Here are some comments:

JOINT EXPENSES

We have again used current records of key computer counts, mailings and time records in allocating some of the joint expenses. These are of lesser reliability since the public relations programs for all four fresh commodities have been brought in-house since those considerable activities are not well measured by these records. Some adjustments have been made in the

percentage allocations based upon staff estimates. In any event, the total budgeted sum for all joint expenses is \$529,725, up from \$505,972 a year ago. The categories reflect both increases and decreases. Important changes are explained below:

Salaries, Executive: The actual increase in this category involves not only salary increases but also an additional employee, the former Director of Consumer Services who will be terminating in July or August. Salaries paid to the Assistant Manager, the Promotional Director and the new Director of Consumer Affairs, even after adjustments, are below those for people with similar responsibilities in other programs.

Salaries, Clerical: All those in this category have received cost of living and some merit increases as well. Three have been raised substantially because of outstanding service and the addition of responsibility which has come from greatly increased budgets. Last year the total budgeted sum for the five programs managed here was \$6,234,867; this year it will approach \$7,000,000.

Equipment, Supplies, Insurance & Utilities: In fiscal 1979-1980, \$80,667 was spent in this category. This sum included the purchase of a System/32 IBM computer and three IBM Mag Card II typewriters. This equipment was purchased at approxi-

mately 25% of original cost and the elimination of rental payments is reflected in the reduced sum budgeted here.

Sacramento Rent: Rent being charged to plums, peaches and nectarines is being reduced from \$6,000 each to \$3,750. The total for this category is now \$17,250, down from \$24,000.

BUDGETS

Research

The attached statements outline eight of the nine research proposals sponsored by the stone fruit committees. These proposals have received more than their share of attention from the stone fruit chairman who have met four times to review them. They have also been reviewed and approved by the Stone Fruit Subcommittee on Promotion and Research. The Plum Estimation project by Phillips is in the second year of a two-year contract. No formal proposal is included since the endeavor is a simple operation in which Phillips estimates the total crop and seven of the most important varieties.

Research costs of the projects are allocated in accordance with the attention given to each fruit. It will be noted that peaches will stand only 20% of the Insect Quarantine and Decay Control project. Less work will be done on peaches because the prospect of exporting them to Japan is considerably less than that for nectarines and plums, fruits not grown in quantity there.

Inspection costs are estimated by the Service and continue to advance with salary increases.

Ripening bowl: The first of these statements is for the last fiscal period and shows a gain of \$118,729.71 after giving effect to the value of the inventory on March 1. Of this, \$100,000 was distributed in equal parts to each of the four sponsoring fresh fruits. The second statement recapping bowl sales for five years is a truer picture as it shows the losses incurred in prior years. The expenses shown on both statements are out-of-pocket expenses and do not set forth any of the considerable administrative and clerical costs associated with the bowl's development and distribution.

Market development

Expenditures for market development proposed for 1980-1981 are attached to each budget. Total budgets for direct promotional activities may be summarized as follows:

(Pears are included although that commodity has not yet adopted a budget.)

TOTAL BUDGETS

Peaches	635,000
Plums	1,001,500
Nectarines	1,064,500
Pears	<u>325,000</u> (tentative)
	\$ 3,026,000

Costs of Components

TV and Radio

Peaches	400,000
Plums	700,000
Nectarines	750,000
Pears	<u>150,000</u> (inc. \$20,000 grant to stone Fruits)
	\$ 2,000,000

Magazine Tie-ins

Peaches	56,000
Plums	74,000
Nectarines	74,000
Pears	<u>21,000</u>
	\$ 225,000

Field Staff

Peaches	47,000	(peaches regionally promoted)
Plums	63,000	
Nectarines	75,000	(nectarines advertise longer than plums)
Pears	<u>52,500</u>	(CA share)
	\$ 237,500	

Consumer Publicity and other Educational Activities, all in-house

Peaches	37,500
Plums	40,000
Nectarines	40,000
Pears	<u>30,000</u>
	\$ 147,500

P-O-S Materials for 1980

Peaches	15,500
Plums	24,000
Nectarines	24,000
Pears	<u>13,500</u> (CA share)
	\$ 77,000

Foodservice Activities (promotions in August with ARA, Canteen, SAGA, Greyhound, Sheraton)

Peaches	10,000
Plums	15,000
Nectarines	15,000
Pears	<u>10,000</u>
	\$ 50,000

Remaining budget items include retail contests, advance expenses for 1981 as for P-O-S materials, other media activities such as talent, production, trade advertising and special activities.

/s/ GALEN GELLER

GALEN GELLER, Manager
California Tree Fruit Agreement
701 Fulton Avenue
Sacramento, CA 95825

May 20, 1980

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date: AUG 8 1980

To : Director, Fruit and Vegetable Division

From : Fruit Branch

Subject : M.O. 916 (California Nectarines) and
M.O. 917 (California Pears, Plums, and
Peaches) - Approval of Market Development
and Research (1980-81 Season)

We recommend that you sign this document which approves the market development and research for California nectarines, pears, plums, and peaches for the 1980-81 fiscal period. The committees met in May and June and recommended these expenditures. The following shows proposed expenditures for Market Development and Research by the individual committees.

COMMITTEES	MARKET *		TOTAL
	DEVELOPMENT	RESEARCH	
Nectarine			
Administrative	\$ 1,114,500	\$ 35,744	\$ 1,150,244
Pear			
Commodity	430,000	—	430,000
Plum			
Commodity	1,051,500	25,463	1,076,963
Peach			
Commodity	<u>685,000</u>	<u>18,743</u>	<u>703,743</u>
Total	<u>\$ 3,281,000</u>	<u>\$ 79,950</u>	<u>\$ 3,360,950</u>

* Includes \$ 50,000 for Fruit Ripening Bowls for each program.

Market Development

The projected market development activities for 1980-81 are similar in scope to those of last season. The increased proposed expenditures reflect for the most part higher costs of doing business and expanded promotional efforts. The following table shows a comparison of estimated expenditures for each of the programs.

COMMODITY	ESTIMATED (1980)	ACTUAL (1979)*	DIFFERENCE
Nectarines	\$ 1,114,500	\$ 950,432	\$ 164,068
Pears	430,000	324,201	105,799
Plums	1,051,500	900,638	150,862
Peaches	<u>685,000</u>	<u>587,760</u>	<u>97,240</u>
Total	<u>\$ 3,281,000</u>	<u>\$ 2,763,031</u>	<u>\$ 517,969</u>

* Includes fruit ripening bowl

Marketing development activities will continue the joint California Summer Fruit promotional approach developed over the past eight years. The two major objectives are to (1) make consumers aware of the fruits' availability, characteristics, and uses, and (2) encourage in-store promotional activity. This is accomplished through field representatives contacting wholesale and retail trade in major U.S. and Canadian cities, emphasis on food page publicity under educational activities, expanded advertising program, development of point of sale material, and promotional research into effectiveness of TV, radio, and magazine advertising. Magazine tie-ins will be utilized to a greater extent this year. This includes a tie-in with Kraft Salad Days, Karo Syrup, and others. The ads will appear in numerous magazines with a circulation approaching 25 million. Each committee will also support an expanded promotional effort in the food-service area. A consultant has been retained to aid in the development of this area. By far the largest single expenditure is for TV and radio time. These

"spots" will be scheduled to coincide with peak fruit movement in a particular market area. The projected 1980 expenditures by market development category for each of the four fruits are as follows:

MARKET DEVELOPMENT	NECTARINES	PEARS	PLUMS	PEACHES	TOTAL
Field Staff Activities	\$ 75,000	\$ 52,500	\$ 63,000	\$ 47,000	\$ 237,500
Retail Contests	15,000	7,500	15,000	9,000	46,500
Early Season Contest	—	20,000	—	—	20,000
Late Season Activities	—	15,000	—	—	15,000
Consumer Publicity	30,000	20,000	30,000	27,500	107,500
Other Education Activities	10,000	10,000	10,000	10,000	40,000
Point-Of-Sale Materials	50,500	28,500	50,500	34,000	163,500
Promotional Research	10,000	—	10,000	10,000	30,000
Foodservice Activities	15,000	10,000	15,000	10,000	50,000
Magazine Tie-ins	74,000	21,000	74,000	56,000	225,000
Television, Radio Time	750,000	165,000	700,000	400,000	2,015,000
Other Media Activities	27,500	23,000	26,500	24,000	101,000
Special Activities	7,500	7,500	7,500	7,500	30,000
Total	\$ 1,064,500	\$ 380,000	\$1,001,500	\$ 635,000	\$ 3,081,000
Ripening Bowl	50,000	50,000	50,000	50,000	200,000
Total	\$ 1,114,500	\$ 430,000	\$ 1,051,500	\$ 685,000	\$ 3,281,000

The consumer education and publicity activities for plums and peaches, formerly conducted by Steedman, Cooper, and Busse, were taken inhouse for this fiscal period. These programs were taken inhouse for the nectarine and fresh pear programs last season. There will be no television spots specifically for pears; but as they will be shown on television commercials made

for plums, peaches and nectarines, the pear committee will reimburse the respective committees.

Research

The projected research proposals for the 1980-81 include nine proposals, as compared with five last fiscal period. The following table shows a comparison of estimated expenditures for 1980 versus actual expenditures for 1979 for research for each program.

COMMODITY	ESTIMATED (1980)	ACTUAL (1979)	DIFFERENCE
Nectarines	\$ 35,744	\$ 16,449	\$ 19,295
Plums	25,463	18,929	6,534
Peaches	<u>18,743</u>	<u>16,448</u>	<u>2,295</u>
Total	<u>\$ 79,950</u>	<u>\$ 51,826</u>	<u>\$ 28,124</u>

The nine proposals include four ongoing (Insect Quarantine and Decay Control, Control of Decay, Pest Management, and the Plum Estimating Project) plus five new projects. The following shows the proposed allocation of expenditures for research projects to the individual commodities.

RESEARCH PROJECT NECTARINES PLUMS PEACHES TOTAL

Insect Quarantine and				
Decay Control	\$ 12,000	\$ 12,000	\$ 6,000	\$ 30,000
Pre- and Postharvest				
Decay Control	4,560	2,280	4,560	11,400
Pest Management	1,517	1,517	1,516	4,550
Peach Limb Sunburn	—	—	1,000	1,000
Maturity vs Quality	5,000	5,000	5,000	15,000
Nectarine Pox (Beutel)	4,300	—	—	4,300
Nectarine Pox				
(Sommer)	7,700	—	—	7,700
Rootstocks and Density	667	666	667	2,000
Plum Estimating				
Project	—	4,000	—	4,000
Total	<u>\$ 35,744</u>	<u>\$ 25,463</u>	<u>\$ 18,743</u>	<u>\$ 79,950</u>

Detailed material concerning market development and research projects is attached.

Recommended: AUG 8 1980 Approved: AUG 11 1980

/s/ <u>signature illegible</u>	/s/ <u>CHARLES R. BRADER</u>
Chief, Fruit Branch	CHARLES R. BRADER
Fruit and Vegetable	Director
Division	Fruit and Vegetable
Agricultural Marketing	Agricultural Marketing
Service	

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
Fruit and Vegetable Division
PO Box 255507
Sacramento, CA 95825

Date: December 15, 1980

To : Malvin E. McGaha, Chief, Fruit Branch
Fruit and Vegetable Division, AMS, USDA

From : W. B. Blackburn, Field Representative
Sacramento Marketing Field Office

Subject : CTFA Budget Changes

On December 5, 1980, the minutes of the fall Nectarine Administrative Committee meeting were transmitted to you along with our comments and today, under separate cover, the Peach Commodity Committee minutes are being transmitted to you. In both memoranda we noted that the approved budgets had been exceeded. One of the major deviations from the original budget estimate was the cost of inspection. The cost per package clearly exceeded the preseason estimate given by the Inspection Agency and the budget was inflated accordingly. The other major factor in budget overrun was occasioned by

additional costs in market development. Specifically, the item "Other Media Activities" includes such items as trade promotion and television and radio production costs, including talent costs. These items are difficult to estimate, according to Charlie Sanderson, and tend to vary substantially from anticipated expenditures.

The table below sets forth the items that need to be acted on by the Department in amending the Nectarine and Peach budgets. We recommend that appropriate action be taken in accordance with the Committee actions.

	<u>Nectarines</u>	<u>Peaches</u>
<u>Market Development</u>		
Budgeted	\$1,064,500	\$ 635,000
Estimated		
Expense	1,074,500	640,000
Recommended	1,075,000	642,000
 Total Budget		
Budgeted	1,824,434	1,370,348
Estimated		
Expense	1,867,964	1,436,739
Recommended	1,870,000	1,440,000

Attached to both the Peach and Nectarine minutes is a table entitled "1980-81 Estimated Expenses, Income and Carryover—All Programs" This table shows that the Pear Committee anticipates expenses of \$529,170 against an approved budget of \$501,170. In discussing the Pear budget with Manager Geller he advises that they anticipate a \$30,000 payment from

the Pear Bureau, which will reduce expenses accordingly. At this time he says there is a 50-50 chance that the Pear budget will not be exceeded. There will be no Committee recommendation to change the Pear budget. The Plum Committee expenses were within the budgeted amount.

/s/ signature illegible

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date: 1-5-81

To : Director, Fruit and Vegetable Division

From : Fruit Branch

Subject : M.O. 916 (California Nectarines) and
M.O. 917 (California Pears, Plums, and
Peaches) - Approval of an Increase in
Expenditures for Market Development
for 1980-81

We recommend that you sign this document which approves an increase in market development expenditures of \$10,500 for California nectarines, and \$7,000 for California peaches for the 1980-81 fiscal year. The Nectarine Administrative Committee and the Peach Commodity Committee met in November 1980, and unanimously recommended increases in their individual market development projects as outlined in the table below. These committees report that greater than anticipated expenses were incurred for the merchandising kit, trade promotion and television and radio production costs. These expense items are included in other media activities under the market development project.

<u>Committee</u>	<u>Amount Approved</u>	<u>Increase</u>	<u>Total</u>
Nectarine			
Administrative	\$1,114,500	\$10,500	\$1,125,000
Peach Commodity	\$ 685,000	\$ 7,00	\$ 692,000

Recommended:

Approved: JAN 05 1981

/s/ signature illegible/s/ signature illegible

Chief, Fruit Branch
Fruit and Vegetable Division
Agricultural Marketing
Service

Deputy Director
Fruit and Vegetable Division
Agricultural Marketing
Service

U.S. DEPARTMENT OF AGRICULTURE [USDA Seal omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date:

To : Director, Fruit and Vegetable Division

From : Fruit Branch

Subject : M.O. 917 - Approval of an Increase in
Market Development for 1980-81 for
California Pears - Impact and Recom-
mendation

We recommend that you sign this document which approves an increase in market development expenditures of \$29,000 for California pears for the 1980-81 fiscal year which ended February 28, 1981. This increase would bring the total spending authorization for 1980-81 to \$459,000. The Pear Commodity Committee in a mail ballot unanimously recommended this increase. The committee reported that shared expenses with the Northwest Fresh Pear Marketing Committee were more than originally estimated. Also, ripening bowl expenses exceeded the estimate and this was not known until February. This action would not involve an increase in the rate of assessment as assessment income received during the period is sufficient to cover this increase.

Recommended: JUN 22 1981 Approved: JUN 26 1981

/s/ WILLIAM J. DOYLE
Acting Chief, Fruit Branch
Fruit and Vegetable Division
Agricultural Marketing
Service

/s/ signature illegible
Director
Fruit and Vegetable Division
Agricultural Marketing
Division

FORM AMS-400 (2-79)

Federal Register
Vol. 45, No. 157
Tuesday, August 12, 1980
[p. 53,450]

Agricultural Marketing Service

7 CFR Parts 916 and 917

**Nectarines and Fresh Pears, Plums, and Peaches
Grown in California; Expenses and Rates of Assess-
ment**

AGENCY: Agricultural Marketing Service, USDA

ACTION: Final rule.

SUMMARY: These actions authorize expenses and rates of assessment for [p. 53,451] the 1980-81 fiscal period, to be collected from handlers to support activities of the committees which locally administer the Federal marketing orders covering nectarines and fresh pears, plums, and peaches grown in California.

DATES: Effective March 1, 1980, through February 28, 1981.

* * * * *

SUPPLEMENTARY INFORMATION: These final actions have been reviewed under USDA procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044, and have been classified "not significant." This final rule is issued

under Marketing Order Nos. 916 and 917 (7 CFR Parts 916 and 917 respectively), regulating the handling of nectarines grown in California (M.O. 916), and fresh pears, plums, and peaches grown in California (M.O. 917). These programs are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). This action is based upon the recommendation and information submitted by the respective committees, established under these marketing orders, and upon other information. It is found that the respective expenses and rates of assessment, as hereafter provided, will tend to effectuate the declared policy of the act.

These actions were recommended at public meetings at which all present could state their views. There is insufficient time between the date when information became available upon which this final rule is based and when the action must be taken to warrant a 60-day comment period as recommended in E.O. 12044, and it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). These orders require that the rates of assessment for a particular fiscal year shall apply to all assessable fruit handled from the beginning of such year which began March 1, 1980. To enable the committees to meet fiscal obligations which are now accruing, approval of the expenses and assessment rates is necessary without delay. It is necessary to effectuate the declared purposes of the act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

Therefore, new §§ 916.219 (M.O. 916) and 917.226; 917.227; 917.228 (M.O. 917) are added to read as follows (§§ 916.219, 917.226, 917.227, and 917.228 expire February 28, 1981, and will not be published in the annual Code of Federal Regulations):

PART 916—NECTARINES GROWN IN CALIFORNIA

Marketing Order 916

§ 916.219 Expenses, rate of assessment, and carry-over of unexpended funds.

(a) Expenses that are reasonable and likely to be incurred by the Nectarine Administrative Committee during fiscal year March 1, 1980, through February 28, 1981, will amount to \$1,824,434.

(b) The rate of assessment for said year payable by each handler in accordance with § 916.41 is fixed at \$0.11 per No. 22D standard lug box of nectarines, or its equivalent in other containers or in bulk.

(c) Unexpended funds in excess of expenses incurred during fiscal year ended February 29, 1980, shall be carried over as a reserve in accordance with § 916.42.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

Marketing Order 917

* * * * *

§ 917.227 Expenses and rate of assessment.

(a) Expenses that are reasonable and likely to be incurred by the Plum Commodity Committee during fiscal year March 1, 1980, through February 28, 1981, will amount to \$1,773,718.

(b) The rate of assessment for said year payable by each handler in accordance with § 917.37 is fixed at \$0.13 per No. 22D standard lug box of plums, or its equivalent in other containers or in bulk.

§ 917.228 Expenses, rate of assessment, and carry-over of unexpended funds.

(a) Expenses that are reasonable and likely to be incurred by the Peach Commodity Committee during fiscal year March 1, 1980, through February 28, 1981, will amount to \$1,370,348.

(b) The rate of assessment for said year payable by each handler in accordance with § 917.37 is fixed at \$0.10 per No. 22D standard lug box of peaches, or its equivalent in other containers or in bulk.

(c) Unexpended funds in excess of expenses incurred during fiscal year ended February 29, 1980, shall be carried over as a reserve in accordance with § 917.38.

* * * * *

Dated: August 7, 1980.

* * * * *

1981-1982 CALIFORNIA STONE FRUIT
BUDGETS

Peach Commodity Committee
Plum Commodity Committee
Nectarine Administrative Committee

In connection with the 1981-1982 stone fruit budgets the following documents are presented:

1. Proposed Allocation of Joint Expenses Among Programs for 1981-1982 Compared With Prior Year.
2. The Stone Fruit Budgets with attachments.
3. Eight Research Proposals.
4. A Recap reporting Ripening Bowl Sales for the past six years.

JOINT EXPENSES

As usual, current records of keyed computer counts, mailings and time records for field staff have been used in allocating some of the joint expenses. These have become less reliable as we have brought more promotional activities in-house because these enormous activities are not accurately measured by such records. We must therefore rely heavily on judgment.

The total budgeted for joint expenses is \$594,236 compared with actual expenses a year ago of \$531,140 with the principal increase in the first category now entitled "Salaries Administrative-Promotion." These are the salaries of five people including a new employee who will understudy the assistant manager until his retirement on October 1. All other proposed

expenses are in line with prior costs except postage, paper and envelopes which is up more than one-third for obvious reasons.

All salaries have been advanced a basic 10% with several key employees receiving 12%.

STONE FRUIT BUDGETS

Research

Expenditures of \$80,320 are proposed for research activities and proposals submitted by the researchers for eight of these projects are attached. These projects are listed in each budget together with the allocations among the three stone fruits and pears. All have been screened by the Stone Fruit Chairmen and the Stone Fruit Advertising and Research Committee. One project entitled "Survey of Marketing Opportunities in Pacific Rim Countries (Moulton)" has been changed considerably since it was presented as a result of conversations between the researcher and the manager, these pursuant to suggestions of the Research Committee. The project is now entitled "The Japanese Market for Plums and Nectarines." This proposal contemplates important work particularly in Japan in researching the market potential there and its results will aid in making decisions on whether to continue the expensive codling moth fumigation work underway for the past three years. This project has been suspended pending a response from the Japanese Ministry of Agriculture, Forests and Fisheries to the researchers' report of work done to date. Two of the projects which relate to nectarine

pox were approved a year ago and half of the money expended.

Three expenditures are listed for which there is no proposals. One is to reimburse Tree Fruit Reserve for travelling expenses of two industry people who together with two scientists visited Hawaii to confer with University and USDA representatives in regard to fumigation for Medfly. Their trip has resulted in the beginning of work at Hilo look toward eliminating the necessity for cold treatments following fumigation as now required by the Quarantine Manual. A second involves preparation for the possibility that all of California will be quarantined and a prototype fumigation chamber is now being completed at Reedley. The purchase of fruit for the Hilo work is the third expenditure. The Giannini Foundation study has not been put together and no funds have been assigned.

Inspection

These costs are estimated by the Inspection Service and are higher for nectarines and peaches but lower for plums. Plum inspection costs were inflated a year ago by the heat damage occurring in Casselman and late variety plums.

Market Development

Proposed expenditures for market development are attached to each budget. These are increased from 26% to 28% with major increases proposed for television and radio including the production of television ads for 1982. Management continues to respond to industry desires for promotional expenditures to keep

pace with rapidly expanding production. This year's media program is an enormous endeavor. Network radio begins on May 25 and during opening week, for example, 30,000 spots will be aired; for the season 71% of all U.S. persons 18 or older will hear Summer Fruits commercials more than 13 times. In TV markets 87% of all adults will view these messages more than 10 times. Magazine ads will reach 63.5% of all U.S. adult women 2.4 times. This does not include expanded food page publicity releases which last year appeared in magazines and newspapers with combined circulation exceeding 200 million.

Ripening Bowl

The attached statement shows the entire history of the bowl. Last year it was re-designed, eliminating the wooden knob which permits close nesting and thus decreases shipping costs about one-third. A self-merchandise is fastened to the top of the bowl and thus will always be at the point of sale, something that was never accomplished with separate pieces. With the new bowl, sales increases are anticipated and to date this fiscal period sales are much ahead of last year. In fact, March and April sales totalled 34% of last year's sales.

/s/ GALEN GELLER
GALEN GELLER, Manager
California Tree Fruit
Agreement
701 Fulton Avenue
Sacramento, CA 95825

May 18, 1981

U.S. DEPARTMENT OF AGRICULTURE
[USDA Seal Omitted]

Memorandum

AGRICULTURAL MARKETING SERVICE
WASHINGTON, D.C. 20250

Date: SEP 29 1981

To: Director, Fruit and Vegetable Division

From: Fruit Branch

Subject: M.O. 916 (California Nectarines) and M.O. 917 (California Pears, Plums, and Peaches) - Approval of Market Development and Research (1981-82 Season)

We recommend that you sign this document which approves the market development and research for California nectarines, pears, plums, and peaches for the 1981-82 fiscal period. The committees met in May and June and recommended these expenditures. The following show proposed expenditures for Market Development and Research for the individual committees:

	MARKET*		
<u>COMMITTEES</u>	<u>DEVELOPMENT</u>	<u>RESEARCH</u>	<u>TOTAL</u>
Nectarine			
Administrative	\$1,410,000	\$19,863	\$1,429,863
Pear Commodity	620,000	1,650	621,650
Plum Commodity	1,263,000	24,154	1,287,154
Peach Commodity	<u>890,000</u>	<u>34,653</u>	<u>924,653</u>
Total	<u>\$4,183,000</u>	<u>\$80,320</u>	<u>\$4,263,320</u>

*Includes \$100,000 for fruit ripening bowls for each program.

Market Development

The projected market development activities for 1981-82 are similar in scope to those of last season. The increased proposed expenditures reflect for the most part higher costs of doing business and expanded promotional efforts. The following table shows a comparison of estimated expenditures for each of the programs:

<u>Commodity</u>	<u>Estimated (1981)</u>	<u>Actual (1980)*</u>	<u>Difference</u>
Nectarines	\$1,410,000	\$1,091,000	\$318,489
Pears	620,000	456,503	163,497
Plums	1,263,000	959,437	303,563
Peaches	<u>890,000</u>	<u>676,073</u>	<u>213,927</u>
Total	<u>\$4,183,000</u>	<u>\$3,183,524</u>	<u>\$999,476</u>

*Includes fruit ripening bowl

Marketing development activities will continue the joint California Summer Fruit promotional approach developed over the past nine years. The two major objectives are to (1) make consumers aware of the fruits' availability, characteristics, and uses, and (2) encourage in-store promotional activity. This is accomplished through field representatives contacting wholesale and retail trade in major U.S. and Canadian cities, emphasis on food page publicity under educational activities, expanded advertising program, development of point of sale material, and promotional research into effectiveness of TV, radio, and magazine advertising. Magazine tie-ins will be utilized to a greater extent this year. This includes the use of Summer Fruits with Knox Gelatin, Kraft Cracker Barrel Cheese, Kraft Salad Days, Karo

Syrup, California Iceberg lettuce, and others. Food page publicity releases appeared in magazines and newspapers with a combined circulation exceeding 200 million. By far the largest single expenditure is for TV and radio time. These "spots" will be scheduled to coincide with peak fruit movement in a particular market area. The projected 1981 expenditures by market development category for each of the four fruits are as follows:

<u>Market Development</u>	<u>Nectarines</u>	<u>Pears</u>	<u>Plums</u>	<u>Peaches</u>	<u>TOTAL</u>
Field Staff Activities	\$75,000	\$55,000	\$63,000	\$47,000	\$240,000
Retail Contests	25,000	7,500	15,000	12,000	59,000
Early Season Contest	—	20,000	—	—	20,000
Late Season Activities	—	20,000	—	—	20,000
Publicity, Education					
Activities	40,000	40,000	40,000	40,000	160,000
P-O-S Materials for 1980	—	—	—	—	—
P-O-S Materials for					
1981	27,000	15,000	27,000	—	86,500
Foodservice Activities	22,500	15,000	22,500	—	75,000
Magazine Tie-ins	106,000	48,000	106,000	—	335,000
TV, Radio Production					
for 1981	27,000	8,000	27,000	17,500	87,000
Television, Radio					
Time	900,000	240,000	775,000	15,000	2,390,000
Other Media Activities	—	—	—	—	—
Trade Communications	25,000	14,000	25,000	—	85,000
Promotional Research	—	—	—	—	—
Retail Projects	15,000	15,000	15,000	15,000	60,000
Television Production					
for 1982	40,000	15,000	40,000	25,000	135,000
Miscellaneous					
Activities	7,500	7,500	7,500	—	30,000
Total	\$1,310,000	\$520,000	\$1,163,000	—	\$3,783,000
Ripening Bowl	<u>100,000</u>	<u>100,000</u>	<u>100,000</u>	<u>100,000</u>	<u>400,000</u>
Total	<u>\$1,410,000</u>	<u>\$620,000</u>	<u>\$1,263,000</u>	<u>\$ 890,000</u>	<u>\$4,183,000</u>

The consumer education and publicity activities, formerly conducted by Steedman, Cooper, and Busse, have been taken inhouse. There will be no television spots specifically for pears; but as they will be shown on television commercials made for plums, peaches and nectarines, the pear committee will reimburse the respective committees.

Research

Expenditures of \$80,320 are proposed for research activities and proposals submitted by the researchers for eight of these projects are attached. These projects are listed in each budget together with the allocations among the three stone fruits and pears. The following table shows a comparison of estimated expenditures for 1981 versus actual expenditures for 1980 for research for each program:

<u>Commodity</u>	<u>Estimated (1981)</u>	<u>Actual (1980)</u>	<u>Difference</u>
Nectarines	\$34,653	\$35,744	\$ - 1,091
Plums	24,154	25,463	- 1,309
Peaches	19,863	18,743	1,120
Pears	<u>1,650</u>	<u>----</u>	<u>1,650</u>
Total	\$80,320	\$79,950	\$370

Three expenditures are listed for which there are no proposals. One is to reimburse Tree Fruit Reserve for travelling expenses of two industry people who together with two scientists visited Hawaii to confer with University and USDA representatives in regard to fumigation for Medfly. Their trip has resulted in the beginning of work at Hilo looking toward eliminating the necessity for cold treatments following

fumigation as now required by the Quarantine Manual. A second involves preparation for the possibility that all of California will be quarantined and a prototype fumigation chamber is now being completed at Reedley. The purchase of fruit for the Hilo work is the third expenditure. The Giannini Foundation study has not been put together and no funds have been assigned.

The following shows the proposed allocation of expenditures for research projects to the individual commodities:

<u>Research Project</u>	<u>Plums</u>	<u>Peaches</u>	<u>Nectarines</u>	<u>Pears</u>	<u>Total</u>
Insect Quarantine and Decay Control	5,080	2,540	5,080		12,700
Embryo Culture	2,056	2,057	2,057		6,170
Pre- and Post harvestDecay Control	4,334	4,333	4,333		13,000
Pest Management	667	667	666		2,000
Construction of More Efficient Peach & Nectarine Factories		4,500	4,500		9,000
Nectarine Pox (Sommer)		3,850			3,850
Nectarine Pox (Beutel)	2,150				2,150
The Japanese Market for Plums and Nectarines	6,250	6,250			12,500
Expenses of Dele- gation to Hawaii	667	666	667		2,000

Construction of Pro-					
tototype fumiga-					
tion Chamber	4,500	4,500	4,500	1,500	15,000
Giannini Foundation					
Study	-	-	-	-	-
Purchase of Fruits					
for Fumigation					
Testing in					
Hawaii	<u>600</u>	<u>600</u>	<u>600</u>	<u>150</u>	<u>1,950</u>
Total	\$24,154	\$19,863	\$34,653	\$1,650	\$80,320

Detailed material concerning market development and research projects is attached.

Recommended: SEP 29 1981 Approved: SEP 30 1981

/s/ signature illegible /s/ D. S. KURYLOSKI

Acting Chief, Fruit Branch	D. S. KURYLOSKI
Fruit and Vegetable Division	Deputy Director
Agricultural Marketing	Fruit and Vegetable
Service	Division
	Agricultural
	Marketing Service

Attachments

AMS:F&V:VFWolverton:vfw:8/6/81

Federal Register
Vol. 46, No. 153
Monday, August 10, 1981
[p. 40,503]

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 916, 917, 919, 921, 922, 923, 924, 930, 945, 946, 947, 948, 953, 958, 967, 985 and 993

Expenses and Rates of Assessment for Specified Marketing Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation authorizes expenses of the committees functioning under Marketing Orders 916, 917, 919, 921, 922, 923, 924, 930, 945, 946, 947, 948, 953, 958, 967, 985 and 993. Funds to administer these programs are derived from assessments on handlers of the fruits, vegetables and specialty crops regulated under the orders.

* * * * *

SUPPLEMENTARY INFORMATION: This rule has been reviewed under USDA procedures and Executive Order 12291 and has been classified "not significant" and not a major rule.

William T. Manley, Deputy Administrator, Agricultural Marketing Service, has determined that this action will not have a significant economic impact on

a substantial number of small entities because it would not measurably affect costs for the directly regulated handlers.

These marketing orders are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674). These actions are based upon the recommendations and information submitted by each committee, established under the respective marketing order, and upon other information. It is found that the expenses and rates of assessment, as hereinafter provided, will tend to effectuate the declared policy of the act.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice and engage in public rulemaking, and good cause exists for not postponing the effective date until 30 days after publication in the Federal Register (5 U.S.C. 553). Each order requires that the rate of assessment for a particular fiscal period shall apply to all assessable fruits, vegetables, and specialty crops handled from the beginning of such period. To enable the committee to meet current fiscal obligations, approval of the expenses is necessary without delay. It is necessary to effectuate the declared policy of the act to make these provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

Information collection requirements (reporting and recordkeeping) under these parts are subject to clearance by the Office of Management and Budget and are in the process of review. These information requirements shall not become effective until such time as clearance by the OMB has been obtained.

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PART 916—NECTARINES GROWN IN CALIFORNIA

§ 916.220 Expenses and assessment rate.

Expenses of \$2,231,368 by the Nectarine Administrative Committee are authorized, and an assessment rate of \$0.125 per No. 22D standard lug box of nectarines is established for the fiscal year ending February 28, 1982; and unexpended funds from the fiscal year ended February 28, 1981, shall be carried over as a reserve.

PART 917—FRESH PEARS, PLUMS, AND PEACHES GROWN IN CALIFORNIA

§ 917.229 Expenses and assessment rate.

Expenses of \$2,097,685 by the Plum Commodity Committee are authorized, and an assessment rate of \$0.16 per No. 22D standard lug box is established for the fiscal year ending February 28, 1982.

§ 917.230 Expenses and assessment rate.

Expenses of \$1,710,714 by the Peach Commodity Committee are authorized, and an assessment rate of \$0.125 per No. 22D standard lug box is established for the fiscal year ending February 28, 1982.

PART 921—FRESH PEACHES GROWN IN DESIGNATED COUNTIES IN WASHINGTON

§ 921.220 Expenses and assessment rate.

Expenses of \$15,080 by the Washington Fresh Peach Marketing Committee are authorized, and an assessment rate of \$3.00 per ton of peaches is established for the fiscal year ending March 31, 1982.

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